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**REPORTS**  
**OF**  
**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**MARYLAND,**

**IN 1810, 1811, 1812, 1813, 1814, & 1815,**

---

**BY THOMAS HARRIS,**  
Clerk of the Court of Appeals,  
and  
**REVERDY JOHNSON,**  
Attorney at Law.

---

**VOLUME III.**

**HERRICK & ALLEN**

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**ANNAPOLIS:**  
**PRINTED BY JONAS GREEN.**

**1826.**

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# ERRATA.

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## PAGE. LINE.

- 2 — 38 For 1807 read 1787.  
 9 — 24 After *Lot* insert inverted commas.  
 13 — 5 After *proceeding* insert a crotchet ]  
 33 — 25 For *that* read *those*.  
 46 — 5 For the last *to* read *at*.  
 70 — 40 For *records* read *record*.  
 98 — 9 Erase *no*.  
 113 — 32 For 6 read 2.  
 154 — In the fourth marginal note. For 55 read 65.  
 161 — 13 After *note* insert a semicolon.  
 — 15 After *note* erase the semicolon, and insert a comma.  
 174 — 18 After *did* insert *not*.  
 182 — 36 After *and* insert after deducting £10,000 for Mr. Harford.  
 199 — 5 Strike out the parenthesis.  
 200 — In the margin. For *D'Anjou & Ball v Deagle*, read *Brayfield v Brayfield*.  
 221 — In the marginal note, line 40. After *did* insert *not*.  
 240 — In the marginal note, line 26. For *of* read *to*.  
 251 — 4 For 1820 read 1800.  
 286 — 29 After *defendant* insert inverted commas.  
 293 — 14 For *ensure* read *emure*.  
 294 — 5 After *did* insert *not*.  
 295 — 22 For *sold* read *held*.  
 315 — 23 After *valid* insert inverted commas.  
 316 — 9 For *estate* read *state*.  
 369 — 13 For *complainants* read *claimants*.  
 373 — 34 For 800 read 900.  
 376 — 31 After *suggested* change the comma into a semicolon.  
 379 — 17 For *the* read *true*.  
 396 — 23 Erase *was*.  
 399 — 2 For *and* read *are*.  
 440 — 43 After *defendant* strike out the semicolon.  
 443 — 30 After *pleaded* insert three pleas, viz. *non assumpsit, non assumpsit in fra tres annos, &c.*  
 445 — 37 After *acres* erase *certain*.  
 498 — 31 After *that* insert *court*.  
 502 — 2 For *on* read *or*.  
 512 — 19 For *using* read *issuing*.  
 514 — 29 For *filed* read *field*.  
 541 — 11 For *demand* read *demurrer*.  
 551 — Between the 14th and 15th lines insert AMENDMENT MADE &c.

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## OF THE COURT OF APPEALS

Hon. JEREMIAH TOWNLEY CHASE, Chief Judge.  
Hon. JAMES TILGHMAN, Judge.  
Hon. WILLIAM POLK, do.  
Hon. JOHN BUCHANAN, do.  
Hon. JOSEPH HOPPER NICHOLSON, do.  
Hon. JOHN MACKALL GANTT, do.  
Hon. RICHARD TILGHMAN EARLE, do.(a)  
Hon. JOHN JOHNSON, do.(b)  
Hon. JOHN DONE, do.(c)  
Hon. WILLIAM BOND MARTIN, do.(d)

## OF THE COURT OF CHANCERY.

Hon. ALEXANDER CONTEE HANSON, Chancellor.  
Hon. WILLIAM KILTY, do.(e)

## OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*Saint Mary's, Charles and Prince George's Counties.*

Hon. JOHN MACKALL GANTT, Chief Judge.  
Hon. EDMUND KEY, Associate Judge.  
Hon. DANIEL CLARKE, do.  
Hon. JOHN JOHNSON, Chief Judge.(f)

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne's and Talbot Counties.*

Hon. JAMES TILGHMAN, Chief Judge.  
Hon. LEMUEL PURNELL, Associate Judge.  
Hon. EDWARD WORRELL, do.  
Hon. RICHARD TILGHMAN EARLE, Chief Judge.(g)

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel and Montgomery Counties.*

Hon. JEREMIAH TOWNLEY CHASE, Chief Judge.  
Hon. HENRY RIDGELY, Associate Judge.  
Hon. RICHARD HALL HARWOOD, do.  
Hon. RICHARD RIDGELY, do.(h)

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester Counties.*

Hon. WILLIAM POLK, Chief Judge.  
Hon. JOHN DONE, Associate Judge.  
Hon. JAMES B. ROBINS, do.  
Hon. JOHN DONE, Chief Judge.(i)  
Hon. WILLIAM WHITTINGTON, Associate Judge.(j)  
Hon. WILLIAM BOND MARTIN, Chief Judge.(k)

(a) Appointed the 20th of May 1809 to fill the vacancy occasioned by the death of Judge *Tilghman*.

(b) Appointed the 25th of March 1811 to fill the vacancy occasioned by the death of Judge *Gantt*.

(c) Appointed the 14th of December 1812 to fill the vacancy occasioned by the death of Judge *Polk*.

(d) Appointed the 13th of December 1814 to fill the vacancy occasioned by the resignation of Judge *Done*.

(e) Appointed the 25th of January 1806 in the place of Chan. *Hanson*, deceased.

(f) Appointed the 25th of March 1811 in the place of Ch. J. *Gantt*, deceased.

(g) Appointed the 20th of May 1809 in the place of Ch. J. *Tilghman*, deceased.

(h) Appointed the 30th of July 1811 to fill the vacancy occasioned by the death of Judge *H. Ridgely*.

(i) Appointed the 14th of December 1812 in the place of Ch. J. *Polk*, deceased.

(j) Appointed the 20th of December 1812 on the promotion of Judge *Done*.

(k) Appointed the 13th of December 1814 in the place of Ch. J. *Done*, resigned.

**FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*****HON. JOHN BUCHANAN, Chief Judge.****HON. WILLIAM CLAGGETT, Associate Judge.****HON. ABRAHAM SHRIVER, do.****HON. ROGER NELSON, do.(a)****HON. THOMAS BUCHANAN, do.(b)****SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*****HON. JOSEPH HOPPER NICHOLSON, Chief Judge.****HON. THOMAS JONES, Associate Judge.****HON. ZEBULON HOLLINGSWORTH, do.****HON. THEODORICK BLAND, do.(c)****OF THE COURT OF OYER & TERMINER, &c.****HON. JOHN SCOTT, Chief Justice.****ATTORNEY GENERAL.***John Johnson, esquire, appointed 18th of October 1806.**John Montgomery, esquire, appointed 29th of April 1811.*

(a) Appointed the 7th of May 1810 to fill the vacancy occasioned by the death of Judge Claggett.

(b) Appointed the 5th of May 1815 to fill the vacancy occasioned by the death of Judge Nelson.

(c) Appointed the 10th of October 1813 to fill the vacancy occasioned by the death of Judge Jones.

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# CASES

## ARGUED AND DETERMINED

### IN THE

## COURT OF APPEALS

### OF

## MARYLAND.

COURT OF APPEALS, (E. S.) JUNE TERM, 1810.

1810.

WHEATLEY VS. WALLIS.

JUNE (E. S.)

APPEAL from the General Court. *Wheatley* brought an action on the case in *Kent* county court, against *Wallis*, for slanderous words spoken by the latter of the former. The words, as stated in the declaration, were these—"You," (meaning the said *Wheatley*,) "stole forty bushels of wheat and forty bushels of corn of me," (meaning *Wallis*). The general issue was pleaded; and at the trial in March 1802, the defendant moved the court to direct the jury, that if they should be of opinion, that the words charged in the declaration were spoken in relation to property; in the possession of the plaintiff, as overseer of the defendant, on wages, that then they must find a verdict for the defendant, as no felony could be committed, by the plaintiff, of goods so circumstanced. But the county court, (*Tilghman*, Ch. J.) directed the jury, that an overseer on wages may be guilty of felony of wheat and corn entrusted to him, as such, by his employer, and consequently, that a charge of stealing such goods was actionable. The defendant excepted; and the verdict and judgment being against him, he appealed to the general court, where the judgment was reversed at September term 1804, and the appellee appealed to this court.

In an action of slander by an overseer against his employer, the words charged were, that the overseer had stolen wheat and corn of the employer. Held, that an overseer on wages may be guilty of felony of the goods of his employer entrusted to him, as overseer, and that a charge of stealing such goods is actionable.

1810.

Horsey  
vs  
The State.

The cause was argued before BUCHANAN, NICHOLSON,  
GANTT, and EARLE, J. by

*Martin*, for the Appellant; and by  
*Barroll and Chambers*, for the Appellee.

THIS COURT reversed the judgment of the General Court,  
and affirmed that of the County Court.

JUDGMENT OF REVERSAL REVERSED.

JUNE (E. S.)

HORSEY VS. THE STATE.

A special court of oyer and terminer and gaol delivery, acting under a commission from the governor, has all the powers and jurisdiction which can be exercised by the county court in criminal cases.

Certain objections, made in arrest of judgment on a verdict of guilty in the above case, overruled, viz. Variances between the names of the grand and petit jurors who found the indictment and verdict, and those returned on the venire—As to the manner of issuing the venire to summon the jury—the committing the prisoner without his being brought into court by a *capias*—the not issuing a *capias*—there being no presentment found; and it not appearing that the jurors were freeholders.

WRIT OF ERROR to the justices of a special court of Oyer and Terminer and Gaol Delivery for Worcester county, to remove the proceedings on a judgment in a criminal prosecution, against the plaintiff in error, for *murder*. The verdict in the court below was guilty, and the prisoner, by his counsel, moved the court in arrest of judgment, and assigned the following reasons: 1. Previous to the adoption of the constitution of this state, all the criminal jurisdiction of the province was vested in, and exercised by, the provincial and county courts. That instrument recognized the county courts, and established a court called The General Court, to which the powers and jurisdiction, exercised by the late provincial court, were transferred. By that instrument an executive power was provided for the state, consisting of a governor and council. The governor is expressly prohibited from the exercise of any prerogative by virtue of any law, statute, or custom of *England*. The issuing of commissions of Oyer and Terminer in *England*, is an exercise of the royal prerogative, inherent in the King by the common law. By the constitution of this state, the powers to be exercised by the governor and council are expressly prescribed; and it is provided and enjoined, that all judges and justices should thereafter be appointed by the governor, by and with the advice and consent of the council. The persons named in a commission of Oyer and Terminer, &c. and authorised thereby to hear and determine criminal charges in any particular place, when acting by virtue thereof, are in the exercise of high and important judicial powers, and are known to the law as justices. The act of assembly, passed at November session 1807, *ch. 1*, by virtue of which the commission, under which this court has

been, and now is sitting, has been issued, gives the power to the governor alone, without the advice and consent of the council, to issue commissions of Oyer and Terminer. Inasmuch, therefore, as the justices of this court have been appointed and commissioned by the governor alone, it is asserted that, under the constitution of the state, the appointment is not only unauthorised, but by the language thereof, expressly prohibited.

2. The jurors, whose names are on the *venire*, are the proper persons to find a bill of indictment. The indictment in this case appears to be found by other jurors, to wit, *Roland E. Bevans* and *Edward Briddle*, whose names are not on the *venire*. [The sheriff's return stated that he had summoned, amongst others, "*Rolin E. Bevans*" and "*Edward Bridle*."] ]

3. The *venire facias* issued in this case, whereby the petit jurors were summoned, was signed by the clerk of *Worcester* county court, and under the seal of *Worcester* county court; whereas by law it ought to have been under the hands and seals of the justices of this court—the clerk of *Worcester* county court not being an officer of this court. [The *venire* to summon the grand jurors, and the *venire* to summon the petit jurors, were both tested in the names of *William Polk*, *John Done* and *William Bond Martin*, Esquires, judges of the court of oyer and terminer, &c. and signed by the clerk, and sealed with the seal of *Worcester* county court.] ]

4. When this court met under the commission, *Horsey*, the prisoner, was not in the gaol of *Worcester* county by virtue of any legal commitment or process; and this court have jurisdiction only to hear and determine cases where the offenders were legally in gaol; and during their session they have no legal right to commit offenders, and to hear and determine on the offences for which they may be so committed.

5. There is a variance between the *venire* for the petit jury, in the names of the jury, and the names of the jury empannelled to try the case, and who have found the verdict.

6. No *capias* was issued against *Horsey*, the prisoner, before he was committed, and a commitment, without being brought into court by a *capias*, was improper and illegal.

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7. After the indictment was found, by law, a *capias* should have issued to bring in the prisoner to answer the indictment, which was not done in this case.

8. By law, an indictment cannot be found without the presentment of a grand jury, or an order by the county court. [In this case there was a presentment found by the grand jury summoned under the commission.]

9. By law, no criminal process can issue or be awarded from any court of original jurisdiction, unless on presentment of a grand jury, or special order of the county court to be entered on record.

10. It should appear by the record that the jurors were freeholders, which does not appear.

The court of oyer and terminer, &c. overruled the motion, and rendered judgment upon the verdict that the prisoner be hanged, &c. The prisoner obtained a writ of error, and the proceedings were brought before this court.

The cause was argued before BUCHANAN, NICHOLSON, GANTT and EARLE, J. by

*Whittington and Wilson*, for the Plaintiff in error, and by  
*J. Bayly*, for the State.

JUDGMENT AFFIRMED.

JUNE.

BOWLY'S LESSEE VS LAMMOT.

W L. by his will, devised as follows: "I give and bequeath to my dear wife A L. for and during her natural life, my tract of land and plantation called C, (save and except the rope walk)." "Item, I give and bequeath to my dear son G L, his heirs and assigns, my tract of land called C; but in case my said son should die before he attains of legal age, and without issue, then I leave and bequeath the said tract of land called C, to my dear wife A L., or her assigns, to be at her own will and disposal, as it originally was, save and except five acres to be laid off;" &c. "and that said five acres, together with the rope walk, I give and bequeath to my dear nephew D B, his heirs and assigns. And it is further my intention, that if my dear wife should die before my dear son G, so that my estate be vested in him, and he should afterwards die before he attains legal age, and without lawful issue, then," &c — Held, that the devise of the rope walk to D B was an immediate, and not a contingent devise.

The intention of the testator is to be collected from the words of the will, and the whole of the will is to be considered and compared. Such construction must be made as will gratify every part of the will, if it can be done consistent with the general intent.

The rope-walk, and the five acres, must be considered as the same.

APPEAL from Baltimore county court. *Ejectment* for a tract of land called *Chatsworth*, lying in Baltimore county. Defence was taken on warrant, and plots were made. At the trial it was admitted by the parties that *William Lux*, deceased, was seized in fee simple, on the 1st of January 1773, of the tract of land called *Chatsworth*, granted to him by patent, containing 950 acres; and being so seized, made his will on the 5th of May 1773, whereby he devised, among other things as follows: "Item. I give and bequeath to my dear wife *Agnes Lux*, for and during her natural life, my tract of land and plantation called

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*Chatsworth*, with the dwelling-house and all the buildings and improvements thereon, (save and except the *Rope Walk*.) “Item. I give and bequeath to my dear son *George Lux*, his heirs and assigns, my tract of land called *Chatsworth*, lying in *Baltimore* county, containing 950 acres; but in case my said son should die before he attains of legal age, and without issue, then I leave and bequeath the said tract of land called *Chatsworth* to my dear wife *Agnes Lux*, or her assigns, to be at her own will and disposal as it originally was, save and except five acres, to be laid off in a long square on the south two degrees west one hundred and thirty-one perch line, being the fifth line from the beginning; and that said five acres, together with the *Rope Walk*, and all the buildings and improvements thereon, I give and bequeath to my dear nephew and partner, *Daniel Bowly*, his heirs and assigns; and it is further my will and intention, that if my said dear wife should die before my dear son *George*, so that my estate be vested in him, and he should afterwards die before he attains legal age, and without lawful issue, then and in such case, I leave and bequeath all that part of my said tract of land called *Chatsworth*, that lies to the northward of a north west line drawn from the beginning trees of the tract of land called *Hop Hazard*, to *Agnes Walker*, and the heirs of her body lawfully begotten, and in default of such issue to *Charles Walker*, his heirs and assigns, for ever; and all the rest and residue of the said tract called *Chatsworth*, I give and bequeath to my said nephew *Daniel Bowly*, and his heirs and assigns, remainder over to my dear brother *Darby Lux*, his heirs and assigns, for ever, subjecting the same nevertheless in either case to the payment of £500 sterling to *Agnes Walker*, and her heirs.” *William Lux* died on the 10th of May 1778, leaving *George Lux* his only son, and heir at law, then of the age of twenty-one years. *Agnes*, the wife of the testator, survived him several years. *Daniel Bowly* was the nephew of *William Lux*, and at the time of the date of the said will was in partnership with him in carrying on the manufactory of rope, in a *Rope-Walk* situated on a part of *Chatsworth*, but *Bowly* was not at that time in any manner interested in the land called *Chatsworth*, nor was there any lease of the *Rope-Walk*, or any articles or terms of partnership. *George Lux* lived many years after his arrival at the age of twenty-

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one years; and after the death of his mother, and while he was in the actual seisin and possession of the land, did, on the 17th of April 1787, by deed, convey in trust, &c. to *William Russell*, "all that part of *Chatsworth* which hath not heretofore been granted and conveyed, and whereof the fee simple remained at and before that time in the said *Lux*, a part of which is now under lease to his under tenants," &c. *Russell*, after the execution of the said deed, entered upon and became seized of such part of *Chatsworth*, as could legally pass in virtue of the said deed, to and for the purposes of the deed; and afterwards by deed, dated the 27th of April 1789, conveyed to *Harry Dorsey Gough* parts of *Chatsworth*, described by courses and distances, and containing sixteen and a quarter acres. *Gough*, on the 9th of May 1801, conveyed to *Lammot*, (the defendant,) the parts of *Chatsworth* conveyed to *Gough* by *Russell*. The five acres of land, mentioned and described in the will of *William Lux*, are included within the lines of *Chatsworth*, and are part thereof; and they are truly located by the plaintiff on the plots in the cause, and are the same five acres of land which the plaintiff claims as his pretensions; but the *Rope-Walk* did not occupy or cover more than two or three acres of *Chatsworth*. The two parcels of land, mentioned and described in the deeds from *Lux* to *Russell*, and from *Russell* to *Gough*, and from *Gough* to the defendant, are parts of *Chatsworth*, and include the land for which this ejectment is brought, and are truly located on the plots, and for which the defendant hath taken defence. *Darby Lux*, named in the will, was the testator's eldest brother, and survived him, and is since dead, leaving issue at this time in full life and being. Upon these facts the defendant prayed the opinion of the court, and their direction to the jury, that the lessor of the plaintiff acquired no estate in the five acres of land in the said will mentioned, competent to support this suit. Of which opinion the court, (*Nicholson*, Ch. J. and *Hollingsworth*, A. J.) were, and did so direct the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Martin, Ridgely and Winder*, for the Appellant, cited *Shep. T.* 84. 14 *Vin. Ab. tit. Grants*, 58, 62, 63. *Wyat. vs. Aland*, 1 *Salk.* 324. *Bac. Ab. tit. Wills, (F)* 522. *Smith vs. Packhurst*, 3 *Atk.* 136; and *Coke Litt.* 5, 56.

*Key and Purviance*, for the Appellee, cited *Chew's Lessee vs. Weems*, 2 *Harr. & Johns.* 173, (note). *Brogden vs. Walker's Ex'r. &c.* *Ibid* 285; and *Belt's Lessee vs. Belt, et al.* 4 *Harr. & M'Hen.* 80.

CHASE, Ch. J. delivered the opinion of the court. The following principles prevail in the construction of wills. The intention of the testator is to be collected from the words of the will, and the whole of the will is to be considered and compared together. Such construction must be made as will gratify every part of the will, if it can be done consistent with the general intent.

The question is, whether the testator intended an immediate devise of the *Rope-Walk* to his nephew *Daniel Bowly*, or intended it to be a contingent executory devise in *Bowly*, depending on the executory devise to *Ann Lux*, vesting in her, on the death of *George Lux* under age, and without issue?

The *Rope-Walk*, and the five acres, must be considered as the same. The five acres, as described in the will, is a particular and precise designation, by metes and bounds, of the land comprehended under the general terms, *The Rope-Walk*.

It is plain the testator did not intend to die intestate of any part of his estate, and particularly of his land called *Chatsworth*. It is also plain he intended the *Rope-Walk* for *Bowly*. If he intended a contingent devise to *Bowly*, there was no necessity for excepting the *Rope-Walk* in the devise to his wife for life, because *Bowly* was not to have it until *Chatsworth* vested absolutely in her on the death of *George Lux* under age, and without issue, and she might have enjoyed the whole of *Chatsworth* without interfering with such intention. But if he intended an immediate devise to *Bowly*, it was necessary to insert in the devise to his wife, for life, the exception of the *Rope-Walk*.

Is there any thing in this will to prevent it being expounded in such manner as will effectuate that intention?

The ninth clause is that part of the will on which the question principally depends. If in reading this clause

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we stop at the words, "*but in case*," the consequence would be, that a fee simple would vest in *George Lux* absolutely. The testator did not intend to give a fee simple to his son, but to modify it in such manner as to create an executory devise to his wife, on the happening of two contingencies; and to effect that intention, it is necessary to read on and complete the sentence, which is not complete until you come to the saving clause which excepts the *Rope-Walk*. The whole clause is one entire sentence, comprehending two dispositions connected with each other, and one arising out of the other; and the intention of the testator, as to the two objects of his bounty, his son and wife, cannot be ascertained until the sentence is finished. The exception or restriction is as operative at the end of the sentence as it would have been at the commencement, and the saving pervades the whole disposition, and extends to the first as well as the latter part of the clause. The saving does not relate to the estate created, but to the thing devised.

This construction is enforced by an expression in a subsequent part of his will, where the testator uses the term his *estate*, (evidently meaning *Chatsworth*) vesting in his son upon the death of his wife; importing thereby it could not vest in him during her life; and if it did not, the devise to *Bowly* must have been intended by the testator an immediate, and not a contingent devise of the *Rope-Walk* to *Bowly*, otherwise it would have vested in his son during the life of the wife.

There is no complete disposition in the clause, until the creation of the estate limited to the wife by way of executory devise. The insertion of the saving manifests plainly what the devise is to operate on, by excepting a particular part, the *Rope-Walk*, which the generality of the words would have included, and if it had been the intention of the testator to apply the contingency to *Bowly*, it is natural to suppose that he would have repeated the words, making the estate contingent immediately after the devise to him, which of itself vests an absolute fee.

BUCHANAN, J, dissented.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED (a.)

(a) See the case of *Lammot's Heirs & Devises vs. Bowly's Heirs*, on appeal from chancery, 6 *Harr. & Johns*. 500.

APPEAL from *Baltimore County Court*. *Ejectment* for a tract of land called *Gist's Inspection*, lying in *Baltimore* county, containing 400 acres. Defence was taken on warrant, and plots were made, by which it appeared that the plaintiff located *Gist's Inspection*, as beginning at I on the plots, which was not counterlocated nor denied by the defendant, but admitted by him to be the place of beginning of *Gist's Inspection*.

1. At the trial in October 1806, the jury by their verdict say, "that they find the bounded red oak tree, mentioned in the grant of *Lun's Lot*, to have stood at figure 9 in the plots, and the said tract of land to run thence, what is called, in the defendant's table of courses on the plots, the thirty-eight perches N 25½° W, and 100 perches N 70½° W lines, according to their several courses and distances in the grant of *Lun's Lot*, with four degrees of variation; and the jury find the beginning of *Gist's Inspection* to be at figure 9 in the plots, and to run thence course and distance according to the grant of *Gist's Inspection*, with an allowance of two degrees for variation. And the jury find for the plaintiff all the land lying within *Gist's Inspection*, according to the location thereof made by the jury, which is not covered by their location of *Lun's Lot*. Motion by the plaintiff to set aside the verdict—1. Because it is against evidence. 2. Because it is against the admissions of the plaintiff and defendant on record. The plaintiff afterwards, at the next term, withdrew his motion, and prayed the court to enter judgment on the verdict; but the court refused to enter a judgment on the verdict. Motion was then made by the plaintiff for a *venire de novo*; and the verdict was set aside, and a *venire de novo* awarded.

2. The defendant, at the second trial in March 1807, having located on the plots the land called *Lun's Lot*, as located and returned by certain commissioners on the 2d of August 1782, and on the present plots made the W N W 100 perches line of the said location terminate in lot

The jury are concluded, by the admissions of the parties as located upon the plots in an action of ejectment, but if they disregard the admissions of the parties, and find the beginning of the tract of land, for which the ejectment is brought, at a different place, the rest of the finding of the jury is predicated upon that mistake, and the court have no power to change the verdict.

If the verdict of a jury is insufficient or contrary to the admissions of the parties, the court have the power of granting a new trial, or ordering a venire.

The jury are to decide on the variation of the compass, and to make such an allowance as corresponds with the proof.

The jury, in fixing the variation of the compass, are not confined to any certain rules, but are governed by the circumstances existing in the case.

The jury in some cases have refused to make any allowance for variation, in others they have allowed at the rate of one degree for every 20 years, and in others they have been influenced by ancient runnings and proof of possession.

Where a verdict is given, and the plaintiff moves for judgment thereon, which is refused by the court on the ground of the insufficiency of the

verdict, and the plaintiff then moves for and obtains a *venire facias de novo*, and a new trial is had, and the second verdict is for the defendant, the plaintiff, on writ of error, cannot take advantage of any error of the court below, in not entering judgment on the first verdict. He has relinquished all advantage he might have been entitled to by acquiescing in the opinion of the court below. *See Chase, Ch. J.*

Where there is a location on the plots in the cause, by either of the parties, of a tract of land, deed, plot, &c. and there is no counterlocation by the adverse party, such location is admitted.

No evidence can be given of the location of a deed, plot, &c. which does not correspond with it.

Where the defendant produced and read certain proceedings, which were variant from the location made on the plots by him, without objection being made to the legality of the evidence, it cannot render the same legally admissible when offered by the plaintiff.

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No. 892 of the city of *Baltimore*; to prove his said location correct on the present plots, read in evidence the proceedings; certificate and plot, made out and returned by the said commissioners in 1782. And as the defendant had read in evidence the said last mentioned proceedings for the purpose aforesaid, the plaintiff offered to read the same to the jury, to show that the same did not correspond with the location made on the present plots by the defendant; but that the W N W 100 perches line terminated in lot No. 900, and not in No. 892. But the defendant objected to the plaintiff's using the said proceedings, plot and certificate, for the purpose aforesaid. And the county court, (*Nicholson*, Ch. J. and *Hollingsworth*, A. J.) determined, that inasmuch as the plaintiff had not counterlocated the proceedings of the commissioners, he could not, by the evidence offered, controvert the location thereof as made by the defendant. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Martin and Winder*, for the Appellant, stated that the *first* question was upon the *first* verdict found by the jury; that the ejectment was brought for *Gist's Inspection*, the beginning of which tract was admitted by both parties to be at letter I on the plots, and the only question for the jury, was as to the variation of the compass on the lines running from the beginning at I; but the jury, disregarding the admission of the parties, by their verdict found the beginning of *Gist's Inspection* to be at figure 9 on the plots. They contended that the finding of the jury, as to the beginning of *Gist's Inspection*, ought to have been rejected as surplusage, and the court should have corrected the verdict so as to make the beginning at the letter I, and rendered judgment thereon. If the jury find what is contrary to the agreement of the parties, it is mere surplusage, and judgment is to be entered on the remaining part of the verdict. They cited 7 *Bac. Ab. tit. Verdict*, (W) 41. *Dyer*, 115, 147, 183. *Goddard's case*, 2 *Coke*, 4. *Hassall vs. Juxon*, *Cro. Eliz.* 283. 2 *Roll. Ab.* 691, (R) pl. 1, 2, 3, 10. *Jenk.* 102. *Wilcox vs. The Servant of Skipwith*, 2 *Mod.* 5. *Clare vs. Pepys*, *Cro. Eliz.* 41. 5 *Com. Dig. tit. Pleader*, (S. 17,

18.) 3 *Leo.* 80. *Tonkin vs. Croker & Billing*, 2 *Lutw.* 1216. 1 *Leo.* 66. *Foster vs. Jackson*, *Hob.* 53, 54. *Vin. Ab. tit. Trial*, 386, 407, 437, 438. *Pal.* 19. *Trials Per Pais*, 284. *Co. Litt.* 227. a. *Rules of Practice*, 11 *Mod.* 64, (2). 2 *Bulstr.* 56. *Tonkin vs. Croker*, 2 *Ld. Raym.* 860. *McFerran vs. Taylor*, 3 *Cranch*, 280; and *Hall vs. Gittings's Lessee*, 1 *Harr. & Johns.* 28.

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*Harper* and *W. Dorsey*, for the Appellee, stated that two questions arose upon the refusal of the court below to enter judgment upon the first verdict—1. Did the court err in so refusing? And 2. If they did, was it competent for the appellant to avail himself of it on his appeal? They admitted, on the *first question*, that the court might mould the verdict so as to carry the intention of the jury into effect; but they contended, that if it had been done in this case there would have been quite a different finding from that contemplated by the jury, since the jury might not have found the same variation of the compass from the beginning at the letter I, which they did from the figure 9. In all the cases cited by the counsel for the appellant, after the surplusage was stricken out, there was a complete verdict remaining upon which judgment could be entered.

On the *second question*, they contended, that the plaintiff below, on the refusal of the court to enter judgment on the verdict, should have availed himself of the error at the time by an appeal or writ of error; but having submitted to the decision, and prayed the court to award a *venire de novo*, which was granted to him, he has waived all error, if there was any.

On the question arising on the *bill of exceptions*, they referred to *Hammond, et al. Lessee vs. Norris*, 2 *Harr. & Johns.* 148. *Keedy vs. Chapline*, 3 *Harr. & McHen.* 578; and *Jarrett's Lessee vs. West*, 1 *Harr. & Johns.* 501.

CHASE, Ch. J. delivered the opinion of the court. As to the first question in this case arising on the refusal of the court to enter up judgment on the verdict of the jury.

It appears to the court that the verdict was insufficient, and that the court below did not err in refusing to enter judgment on it, and in granting a *venire facias de novo*.

The jury were concluded by the admissions of the parties, and ought to have found the beginning of *Gist's Inspection* at I, the place admitted; but having disregarded

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the admissions of the parties, and found the beginning of *Gist's Inspection* at a different place, figure 9, the subsequent finding of the jury is predicated on that mistake, and the courses and distances of *Gist's Inspection*, as found by the jury, must run from figure 9, and the court have no power to change the verdict, and to lay them down from I, contrary to their intention plainly expressed.

If the verdict of the jury is insufficient, or contrary to the admissions of the parties, the court have the power of granting a new trial, or ordering a *venire*, for the attainment of justice.

It is the acknowledged and exclusive province of the jury to decide on the variation of the compass, and to make such an allowance as corresponds with the proof, and will advance justice. The juries, in fixing the variation of the compass, are not confined to any certain rules, but are governed by the circumstances existing in the case. The juries, in some cases, have refused to make any allowance, in others they have allowed at the rate of one degree for every twenty years, and in others they have been influenced by ancient runnings and proof of possessions. There being, therefore, no certain criterion by which the allowance can be ascertained with precision, it would be assuming too much in the court to change the verdict in this case, by running the courses according to the patent of *Gist's Inspection* from I, instead of the figure 9, with the same allowance of variation.

[ (a) It appears to me that the plaintiff has relinquished all advantage he might have been entitled to, by acquiescing in the opinion of the court, and moving for a *venire facias de novo*, and obtaining a new trial. The ground of the motion was the insufficiency of the verdict, and was granted at the instance and on the suggestion of the plaintiff. If the court below had erred in refusing to enter up judgment on the verdict, and the plaintiff had rested his case on it, judgment of *non pross* would have been given, and the plaintiff could have obtained redress by writ of error; but according to this mode of proceeding, if sanctioned by this court, the plaintiff will have the benefit of a second trial, and the right of afterwards questioning the judgment below. The *venire facias* was granted on the motion, and

(2) The part here inserted in *crotchets* did not form a part of the opinion of the court.

at the instance of the plaintiff, and on the ground that the verdict was insufficient and void, and the plaintiff, having had the benefit of a second trial, and failed, cannot now, I think, be allowed to question the legality and propriety of the proceeding.

The court considered it as a principle, established beyond controversy, that where there is a location on the plots by either of the parties, of a tract of land, deed, plot, &c. and there is no counterlocation by the adverse party, such location is admitted.

It is also established, that no evidence can be given of the location of a deed, plot, &c. which does not correspond with it.

In this case the proceedings, certificate and plot, of the commissioners, being variant from the location made on the plots by the defendant of the said proceedings, certificate and plot, could not legally be admitted as evidence. The defendant having produced and read the same to the jury, without objection being made to the legality of the evidence, could not render the same legally admissible when offered by the plaintiff; and this court are of opinion, that the court below did not err in rejecting the said testimony, and do affirm the judgment.

GANTT, J. dissented as to the opinion expressed on the bill of exceptions.

JUDGMENT AFFIRMED.

WOOD VS. GRUNDY & THORNBURGH'S Lessee.

JUNE.

APPEAL from Baltimore county court. *Ejectment* for a lot situate in the city of Baltimore, in that part of the

The proceedings of the commissioners of bankruptcy are not evidence to

prove the act of bankruptcy committed by the bankrupt—the proceedings being *res inter alios acta*, and not evidence according to the principles of the common law, and not made evidence by the laws of the U. S. which relate to this subject.

Where the demise in a declaration in ejectment was stated to be on the 1st of January 1801, and the conveyance offered in evidence, under which the plaintiff claimed, was dated on the 23d of February 1802—*Held*, that an ejectment is an action to try the right of possession to the land in controversy. The lease, entry and ouster, laid in the declaration, are fictitious, and substituted in the place of a real lease, actual entry and ouster. The time of the demise is matter of substance, and not form, and the plaintiff must show a title in his lessors anterior to the time of the demise, because without such title they could not make a real lease.

In an action for the *mesne profits*, the plaintiff can recover profits from the time of the demise, without showing title, the defendant being concluded by it. But if he claims profits prior to the time of the demise, the defendant may controvert his title.

The court will allow the plaintiff in ejectment to amend his declaration, by charging the time of the demise, at any time before verdict, on such terms as will impose no hardships on the defendant.

The second section of the act of 1809, ch 153, relative to the amendment of judicial proceedings, does not extend to matters of substance, but to form.

The plaintiff in ejectment gave in evidence a grant to E. I. in 1673, for a tract of land called L. L.; also an act of assembly passed in 17-2, which recited that J. E. H. had set forth that he was seized and possessed of L. L. &c. and directed that L. L. should be sold out and form part of Brown; also that lot No 687 was part of L. L., so claimed by J. E. H., and sold off as part of the said town; that the lot was conveyed by J. E. H. to B. D. who possessed it from 1792 to 1795, when he conveyed it to A. B., who also possessed it until 1802, when he conveyed it to the lessors of the plaintiff—*Held*, that the plaintiff had no right to recover, there being no title deduced from the grant of L. L. to J. E. H., and there being no possession proved in A. B., and those under whom he claimed, sufficient to entitle the plaintiff to recover without showing title.

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vs  
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city called *Howard's* late addition to *Baltimore*, and known on the plot thereof by No. 687, &c. The demise in the declaration was stated to be on the 1st of January 1801. The general issue was pleaded.

1. The plaintiff, (now appellee,) at the trial, produced and had witnesses sworn to prove that *Aquila Brown*, of *Baltimore*, merchant, was a person using trade and commerce at the said place, and that he was indebted before and on the 20th of February 1802, and afterwards, to *Nicholas Norris*, in a sum exceeding \$2000; that *Norris* on the 22d of February 1802, sued out a writ of *capias ad respondendum* against *Brown*, which was returned *non est*. And the defendant, (now appellant,) having offered evidence to prove that the debt due to *Norris* had not become due or payable before or at the time when the writ of *capias ad respondendum* was issued, the plaintiff further produced and showed to the court the commission, qualifications, depositions and proceedings, before the commissioners, and their judgment thereon, as herein after mentioned, and offered to read the judgment of the commissioners to the jury, to prove that *Brown* had committed an act of bankruptcy before the issuing of the said commission; and further offered to prove that *Norris*, in the petition and writ aforesaid mentioned, was one and the same person, and that *Brown*, in the writ and judgment aforesaid mentioned, was one and the same person. The defendant objected to the judgment of the commissioners being read in evidence to show that *Brown* had committed an act of bankruptcy, as in the said judgment stated. But the court, (*Nicholson Ch. J*) was of opinion, that the judgment of the commissioners was *prima facie* evidence of the bankruptcy, and might be read to the jury to support the title of the assignees of *Brown*; but that if the jury should be of opinion, that the debt from *Brown* to *Norris* was not due at the time of issuing the *capias ad respondendum*, that then the judgment of the commissioners did not prove the bankruptcy. The defendant excepted.

2. The plaintiff then read in evidence the patent for a tract of land called *Lun's Lot*, granted to *Edyard Lun*, on the 20th of July 1673; also an act of assembly passed at April session 1782, entitled, "An act for an addition to *Baltimore* town, in *Baltimore* county," reciting, that *John Eager Howard* had set forth that he was seized and possessed of a great part of *Lun's Lot*, part of which had been

laid out into lots, and annexed to *Baltimore-town*, &c. He prayed a law authorising other parts of the said tract to be laid out into lots, &c. The commissioners of *Baltimore-town* were therefore required to cause the said tract of land to be surveyed and laid out into lots, &c. at the proper cost and expense of the said *Howard*, &c. The plaintiff also read in evidence the original location of said addition, made in pursuance of said law; from the original record filed in the Mayor's office of the city of *Baltimore*; and offered evidence to prove, that lot No. 687 in the said addition, on the said plot, is the same lot for which the present ejectment is brought. He also read in evidence a deed from *John Eager Howard*, in the said act mentioned, to *Henry Didier*, for the said lot, dated the 8th of October 1792; and also a deed for the said lot from *Didier* to *Aquila Brown*, dated the 15th of April 1795. He also offered in evidence, that *Brown*, in the said deed mentioned, was a person using trade and commerce at the city of *Baltimore* on the 19th of February 1802, and indebted to *Norris* in a sum exceeding \$2000, and that *Norris* sued out a writ of *capias ad respondendum* against *Brown*, to recover said debt, on the 22d of February 1802; and produced and showed to the court the petition, commission, qualification, depositions and proceedings, before the commission of bankruptcy, and their judgment thereon; and read to the jury the judgment of the commissioners to prove, that *Brown* had committed an act of bankruptcy before the commission issued; and further read in evidence the appointment and qualification of the assignees under the proceedings of bankruptcy; and read in evidence the deed from the commissioners to the assignees, the lessors of the plaintiff, bearing date the 23d of February 1802; and offered evidence to prove, that the commissioners in the said deed mentioned were the same persons appointed under the commission of bankruptcy; and that the lessors of the plaintiff, and the grantees in that deed named, are the assignees under the said commission, and no other or different. The defendant then offered to prove, that the debt of *Norris* was not payable at the time of issuing the writ by him against *Brown*. The court, upon the prayer of the plaintiff, directed the jury, that if they believed the debt from *Brown* to *Norris* was due and payable at the time of issuing the *capias ad respondendum*, in the name of *Norris* against *Brown*; and also if they believed the evidence offered by the plaintiff, that then

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the plaintiff is entitled to recover. The defendant excepted.

3. The plaintiff then offered evidence to prove, that the lots, for which this ejectment is brought, was part of the land mentioned in the act of assembly aforesaid, (1782, *ch. 2*,) so claimed by *Howard*, and laid off into a town, and that the said lot was conveyed by *Howard* to *Didier*, and was improved by *Didier* about ten years ago, and continued in his occupation and possession until he sold it to *Brown*, who continued in possession of the lot and premises until the 22d of February 1802. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if they believed the evidence on the part of the plaintiff, that then *Brown* had a legal and valid estate in the lot on the 22d of February 1802, according to the limitations in his deed. Which direction the court gave. The defendant excepted.

4. The plaintiff then prayed the opinion of the court, and their direction to the jury, that the petition, commission and assignment, under the commission of bankruptcy issued against *Brown*, (which he offered in evidence,) were competent and proper to prove the facts therein mentioned, and that if the defendant does not show title to the premises in the declaration mentioned, out of *Brown*, before and on the 22d of February 1802, that then the defendant must claim subsequent to the act of bankruptcy stated in the commission; and if the jury so find, that then the assignment of the bankrupt's effects gives title to the premises in the lessors of the plaintiff, and the plaintiff is entitled to recover. Which direction the court gave. The defendant excepted.

5. The plaintiff further prayed the opinion of the court, and their direction to the jury, that if the defendant shows no title out of the plaintiff before the 22d of February 1802, and no conveyance from him at any time since, that then the assignment under said cause of bankruptcy is evidence of title in the lessors of the plaintiff, until some title is shown out of *Brown* before or after that day. Which direction the court gave. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Martin* and *W. Dorsey*, for the Appellant, in arguing on the *first* bill of exceptions, contended that the judgment of the commissioners, under the commission of bankruptcy, was not *prima facie* evidence sufficient to prove that *Brown* was a bankrupt under the bankrupt law of the *United States* of the 4th of April 1800. In *England*, under the bankrupt laws, the assignees in suits brought by them, are bound to prove every fact by *viva voce* evidence. The proceedings of the commissioners are not evidence even in actions to recover money due to the bankrupt; they are not evidence except in actions between parties and privies. Upon common law principles the judgment of the commissioners is not evidence for any purpose; and the bankrupt cannot be a witness to prove his own bankruptcy. They cited the bankrupt law of the *United States*, passed on the 4th of April 1800, (3 *Vol. Laws U. S.* 320.) *Bull. N. P.* 37. *Cooper's B. L.* 105, 173, 306, 307, 380. *Abbot vs. Plumbe*, 1 *Dougl.* 216. *Chapman vs. Gardner*, 2 *H. Blk. Rep.* 279. *Buteman vs. Bailey*, 5 *T. R.* 512. *Schw. N. P.* 222, 226. *Vaughan vs. Martin*, 1 *Esp. Rep.* 440. 1 *Lofft's Gilb.* 31, 32, 64, 65. *Mann vs. Shepherd*, 6 *T. R.* 79. *Field vs. Curtis*, 2 *Stra.* 815; and *Bickerdike vs. Bollman*, 1 *T. R.* 405.

On the *second* bill of exceptions they contended, that the declaration in ejectment shows that the demise was laid on the 1st of January 1801, long before the title accrued to the lessors of the plaintiff, and therefore the plaintiff could not recover. They cited *Berrington vs. Parkhurst*, 2 *Stra.* 1086. *Runn. Eject.* 86. *Bull. N. P.* 105, 106, 86, 87. 2 *Esp. Dig.* 443. 3 *Blk. Com.* 205; and *Aslin vs. Parkin*, 2 *Burr.* 668.

On the *third* bill of exceptions they contended, that the title set out did not give *Brown* a title to the lot in question; and there was no evidence that Col. *Howard* had a title to the premises by him conveyed to *Didier*, under whom *Brown* claimed.

On the *fourth* and *fifth* bills of exceptions they contended, that under the bankrupt law the whole proceedings of the commissioners, not a particular part, may be evidence for certain purposes, but that here a part only of the proceedings had been offered and admitted as evidence.

*Key*, *Harper* and *S. Chase*, jr. for the Appellee, contended, upon the *first* bill of exceptions, that the commis-

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sioners were created a court of record, and with competent jurisdiction; that they acted judicially, and their judgment must be a judicial act, and sufficient evidence for the purpose for which it was admitted. They cited *Burr. Sett. Cases*, 136. *Billings vs. Prinn & Delabore*, 2 *W. Blk. Rep.* 1017. *The King vs. Forrest*, 3 *T. R.* 38. *The King vs. The Inhabitants of, &c.* *Ibid* 380. *Cooper's B. L.* 174. *Darby vs. Baughan*, 5 *T. R.* 210; and the 51st and 56th sections of the bankrupt law of the *U. S.*

Upon the *second* bill of exceptions they contended, that an ejectment was a fictitious action, and may be moulded by the court for certain purposes. The demise is a matter of form, and is an immaterial part of the declaration; and besides, under the act of 1809, *ch.* 153, it could be amended. They cited *Doe vs. Pilkington*, 4 *Burr.* 2449. *Bennett vs. Ganby*, *Carth.* 178. *Aslin vs. Parkin*, 2 *Burr.* 665. *Small vs. Cole*, *Ibid* 1159. *Fairclaim vs. Shamtitle*, 3 *Burr.* 1292. *Oates vs. Brydon*, *Ibid* 1895; and the act of 1809, *ch.* 153, *s.* 3.

Upon the *third* bill of exceptions they contended, that the act of April 1782, *ch.* 2, recites that Col. Howard was seized and possessed of *Lun's Lot*, and directs that *Lun's Lot* should be laid out and form a part of *Baltimore town*; and there was sufficient evidence offered without deducing title from the grantee of *Lun's Lot*.

Upon the *fourth* and *fifth* bills of exceptions they contended, that the 56th section of the bankrupt law renders it unnecessary to produce more than certain papers in evidence. The assignment of the commissioners was evidence of all the facts therein stated; and it was sufficient evidence against an intruder without title.

CHASE, Ch. J. delivered the opinion of the court. The court dissent from the opinions of the county court as expressed in the several bills of exceptions taken in this case.

On the *first* bill of exceptions, the court are of opinion, that the proceedings of the commissioners of bankruptcy are not legally admissible as evidence in this case, to prove the act of bankruptcy committed by *Aquila Brown*—the proceedings being *res inter alios acta*, and not evidence according to the principles of the common law, and not made evidence by the laws of the *United States*, which relate to

this subject. The opinion, therefore, of the court below on this bill of exceptions is erroneous.

On the *second* bill of exceptions, the court are of opinion, that the opinion of the court below is erroneous, this court being of opinion, that it appears by the proof stated in the case that the lessors of the plaintiff below had no title at the time of the demise laid in the declaration of ejectment, but that their title, if they had any, accrued subsequently to that time.

An ejectment is an action to try the right of possession to the land in controversy. The lease, entry and ouster, laid in the declaration, are fictitious, and substituted in the place of a real lease, actual entry and ouster. The time of the demise is matter of substance, and not form, and the plaintiff must show a title in his lessors anterior to the time of the demise, because without such title they could not make a real lease.

In an action for the mesne profits, the plaintiff can recover profits from the time of the demise, without showing title, the defendant being concluded by it; but if he claims profits prior to the time of the demise, the defendant may controvert his title.

The court will allow the plaintiff to amend his declaration at any time before verdict, by changing the time of the demise, for the attainment of justice, on such terms as will impose no hardships on the defendant.

That clause of the act of last session, (*Nov. 1809, ch. 153, s. 2.*) which has been referred to, does not extend to matters of substance, but to form.

It appearing on the record that the lessors of the plaintiff had no title to the land in question, at the time of the demise, the judgment must be reversed.

On the *third* bill of exceptions, the court are of opinion, that according to the whole proof stated in the case, the plaintiff has no right to recover, there being no title deduced from the patentee of *Lun's Lot* to *John Eager Howard*, and there being no possession proved in *Aquila Brown*, and those under whom he claims, sufficient to entitle the plaintiff to recover in ejectment without showing title.

JUDGMENT REVERSED.

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APPEAL from Baltimore county court. Ejectment for a tract of land called *Franklin's Neglect and Cockey's Discovery*, lying in Baltimore county. The defendant, (now appellee,) took defence on warrant, and plots were made.

In an action of ejectment it is incumbent on the plaintiff to show a grant of the land for which the action is brought. To prove such grant he must produce the grant, or a copy under seal. This is the general rule, and must be generally adhered to. The cases in which this general rule has been deviated from, and in which secondary evidence has been resorted to for presuming a grant, rest on strong facts and circumstances, evincing an equitable right to the land—an incipient title from the proprietary, and length of possession in conformity thereto—mesne conveyances and wills transmitting the right from the taker-up to the plaintiff.

The producing the grant is the first step in deducing title; if that is wanting, and inferior testimony is resorted to for presuming a grant, the foundation must be laid by stating and combining all the facts and circumstances existing in the case, on which the court are to direct the jury to presume and find a grant.

To repel the plaintiff's title, the defendant must produce an antecedent grant, or give evidence that such grant had existed; or show an incipient title, or proof that the records of the land office were lost or destroyed, and show a rightful possession accompanying the defendant's title.

Length of possession is the great and leading fact in presuming grants and deeds, and without which no grant or deed can be presumed.

A deed from C to F, (under whom the defendant claimed,) for land which did not appear to have been previously granted, was offered in evidence, and there was no evidence that C was ever in the possession of the land—*Held*, that if C was ever in possession, he was an intruder, and his deed could not operate to transfer any right to the land; and the entry and possession of F was an intrusion, the land being vacant; and that the deed from C to F, and the certificate of the receipt for the alienation fine endorsed thereon, are not legal and competent evidence.

It is the exclusive right of the court to decide on the legality and competency of all testimony offered to the jury.

Where two papers, purporting to be copies, made (not under seal,) between 1746 and 1759, by a former register of the land office, of certificates of surveys of two tracts of land, one surveyed in 1665, and the other in 1710, and stated to have been taken from particular record books of that office, but which books could not be found in the office, were offered in evidence, with proof of 40 years extensive possession of the lands, by the defendant and those under whom he claimed—*Held*, that the copies, not having been certified by the register under the seal of the land office, and being without date, cannot be read in evidence.

It belongs to the court to determine on the legal sufficiency of facts and circumstances which will warrant the jury in presuming and finding a grant.

Where the proof was insufficient in law for the court to direct the jury to presume a grant of the land in question from the Proprietary.

1. The plaintiff at the trial gave in evidence the certificate and patent of a tract of land called *Franklin's Neglect and Cockey's Discovery*, surveyed on the 14th of January 1802, for, and granted to, *John Cockey*, the lessor of the plaintiff, on the 23d of April 1803. He also gave in evidence that the said tract of land is truly located by him, as his claim and pretensions, on the plots. The defendant gave in evidence that the tracts of land called *Gibson's Forest* and *Warner's Chance*, for which she takes her defence, began, as located by her on the plots, and that the black letter A on the plots, is the termination of the third line of Lord *Baltimore's* manor. And also that for forty years now last past, *Thomas Franklin*, whose heir at law the defendant is, and those claiming under him, down to the defendant, to the present time, have been in the actual possession and occupation of parts of the said lands, as located on the plots, claiming the whole, and using and cultivating the parts so located, and that no person, except *Franklin*, and those claiming under him, has ever been known to possess or claim any part of the lands until the lessor of the plaintiff caused the certificate of *Franklin's Neglect and Cockey's Discovery* to be made and returned. She also gave in evidence, that the lands on the west side of the said two tracts as located, were

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held and possessed by *John Wilson*, and that the lands on the east side of the said tracts, as so located, were held and possessed by the *Boyce* family, and that the lands lying between *Boyce* and *Wilson's* lands were always deemed and reputed to be the lands of *Franklin*. She also gave in evidence, by *Thomas Jones*, esquire, formerly collector of quit rents of the Lord Proprietary, for *Baltimore* county, that from the year 1769, till the expiration of the proprietary government in *Maryland*, during which period *Jones* was collector, *Franklin* paid quit rents for the said two tracts of land, under the names of *Gibson's Ridge* and *Warner's Chance*, and that there is a tract of land in *Harford* county, called *Gibson's Ridge*, containing 500 acres, for which quit rents were paid during the said period by other persons. She also read in evidence two receipts from *Jones* to *Franklin* for the quit rents, one for quit rents of *Gibson's Ridge* and *Warner's Chance*, containing 1056 acres, for one year ending the 29th of September 1771, and the other for one year ending the 29th of September 1774. She further gave in evidence the certificate of a tract of land called *The Valley of Jehosaphat*, lying in *Baltimore* county, upon the head of *Gunpowder* river, and upon the N side of the S branch of that river, surveyed on the 27th of September 1683, for *Richard Smith*, and containing 2500 acres. She also gave in evidence, that the three first lines of the last mentioned tract of land are truly located by her on the plots, and that the termination of the third line thereof is at the little black figure 1 on the plots; and that the true beginning of *Gibson's Forest* is at the said figure; and also that the true beginning of *Warner's Chance* is at the red letter *A* on the plots, and is near to a branch running into the little falls of *Gunpowder*, and that the said branch is truly located by her on the plots. She also gave in evidence a regular descent from *Franklin* to her, as his heir at law. She then offered to read in evidence, for the purpose of showing title to *Gibson's Forest* and *Warner's Chance* in *Franklin*, under whom she claims, a deed from *John Clark* to *Franklin*, bearing date the 2d of August 1765, duly acknowledged according to law on the same day, and recorded among the land records of *Baltimore* county, on the 31st of October 1765, whereby, in consideration of £375 current money, *Clark* conveyed to *Franklin* "all those two tracts or parcels of land lying in

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*Baltimore* county, between the north and south branches of *Gunpowder* river, the one called and known by the name of *Gibson's Forest*, originally, on or about the 20th day of October 1695, was surveyed for a certain *Miles Gibson*, beginning at a bounded red oak standing on the side of a hill near a run, supposed to have been bounded for the land of *Richard Smith*, and running thence north east sixty-six perches to the end of the south-west line of his Lordship's manor," &c. containing 720 acres. "The other tract called *Warner's Chance*, originally, on or about the 17th of November 1710, was surveyed for a certain *John Warner*, for 336 acres, beginning at three bounded red oaks standing on a point near the head of a branch descending into the little falls of *Gunpowder* river, the said trees standing on the N W side of the said branch, and runs thence," &c. She also offered to read in evidence a note or memorandum entered in the said records, under the record of the said deed, in page 14 of Liber B, No. P, viz. "See alienation receipt recorded in this book fol. 534;" which memorandum is written by way of interlineation, in a different ink, and a different handwriting from the record of the said deed, namely in the handwriting of *John Beale Bordley*, then clerk of *Baltimore* county court. She also offered to read in evidence the record of a receipt for the alienation fine on the said deed, which receipt is mentioned in the said memorandum, and is recorded among the land records aforesaid in Liber B, No. P, page 534, and is stated to be endorsed on the deed from *Clark* to *Franklin* as recorded in the said book in pages 10, &c. and is as follows, viz. "Received forty-two shillings and three pence sterling, for an alienation fine of the within mentioned two tracts of land, for the use of Lord *Baltimore*, by order of his Lordship's agent *Edw. Lloyd*, esquire.

*John Boyd.*"

She also proved to the jury that *John Boyd*, by whom the said receipt purports to be signed, was, on the 2d of August 1765, and for sometime afterwards, receiver of alienation fines in *Baltimore* county. But the plaintiff objected to the reading of the said deed and record of the said receipt; and the court, (*Nicholson*, Ch. J.) overruled the objection, and permitted the said deed and receipt to be read in evidence to the jury, which was accordingly done. The plaintiff excepted.

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2. The defendant then, to show title in *Franklin* and those claiming under him, down to her the defendant, in and to *Gibson's Forest* and *Warner's Chance*, read in evidence a commission from *Benjamin Tasker* and *Benjamin Young*, registers and chief judges of the land office, to *Thomas Jennings*, bearing date the 18th of May 1746, constituting and appointing him chief clerk of the land office. She also gave in evidence, that *Jennings* continued to hold and execute the office of clerk of the land office, under the said commission, until the time of his death, which took place some time in 1759. And also, to prove that some of the records of the land office have been lost, she gave in evidence, that original patents for land have been found in the state of which no record ever could be discovered in the land office, or elsewhere; and that in the year 1776 or 1777, the records of the land office were removed from *Annapolis* to *Upper Marlborough* in *Prince-George's* county, where they remained one year and upwards; and that there has been a tradition or report in the land office of the loss of some of its records prior to 1746. She also gave in evidence, that no certificates, warrants or patents, for the tracts of land called *Gibson's Forest* and *Warner's Chance*, or either of them, or of any tracts of either of those names, can be found among the records of the land office, now existing, where they have been repeatedly searched for, and that no such record books as Liber D D, No. 8, or Liber No. 28, do now exist or can be found among the records of the land office, or elsewhere. The defendant then produced two papers, purporting to be true copies from certain books of records in the land office, one called Liber D D, No. 8, and the other called Liber No. 28, certified by the said *Jennings* then clerk of the land office, under his hand as clerk thereof, of two certificates of surveys, one of *Gibson's Forest*, and the other of *Warner's Chance*, the first surveyed for *Miles Gibson* on the 20th of October 1695, and the latter surveyed for *John Warrer* on the 17th of November 1710, and describing each of those tracts as they are described in the deed from *Clark* to *Franklin* as herein before set forth. She also proved, by witnesses produced and sworn, who were well acquainted with the said *Jennings*, and with his signature, that the name *Thomas Jennings*, subscribed to the said papers, purporting to be co-

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pies of the certificates of *Gibson's Forest* and *Warner's Chance*, are the handwriting and signature of the said *Jennings*, and are also in the handwriting with other copies of land records and patents appearing to have been made and issued by the said *Jennings* while clerk as aforesaid; and she also gave in evidence, that while the said *Jennings* was clerk as aforesaid, another person of the name of *Thomas Jennings* was an assistant to him, and wrote for him in the said office; and she then produced a paper, purporting to be a true copy from a record book in the said office called Liber No. 28, of the certificate of *Gibson's Forest*, similar to the copy herein before mentioned. She also proved by witnesses produced and sworn, which witnesses were well acquainted with the said last mentioned *Thomas Jennings*, and with his signature and handwriting, that the last mentioned paper, and the signature thereto, are in the handwriting and signature of the last mentioned *Jennings*. She also gave in evidence, that *John Lawson*, one of the clerks of the land office, did sometimes, in his official certificates, style himself *Register*. She also gave in evidence, that the body of the last mentioned paper, purporting to be a copy of the certificate of *Warner's Chance*, is in the same handwriting with the body of some patents issued from the land office before the year 1760. The plaintiff then read in evidence certain entries from the proprietary *debt books*, for the years 1754 to 1771, inclusive, whereby it does not appear that the *quit rents* on *Gibson's Forest* and *Warner's Chance* were charged to *Thomas Franklin* on the said debt books. He also offered in evidence by *John Brewer*, that he was, and at present is, an assistant clerk to *John Kilty*, register of the land office, and had for eleven years last past been clerk in the said office, acting for many years in said office as a clerk to *John Callahan*, the register thereof, and that he never heard or understood that any record book belonging to the said office had been lost or missing of late years; he never heard or understood that any record book of said office had been lost during the revolutionary war, or at any period shortly before. That Mr. *Callahan*, now dead, informed him, that he had never seen in the office a reference to a book in the office, which he could not find; that seeing a record book of certificates in the office for a number which he could not find patents, he was some-

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times induced to believe a record book of patents might have been lost, but on the whole he thought no book was lost; and that the warrants are all recorded in different books from the books in which the certificates and grants are recorded; and he never heard, nor from many years examination of the records has he any reason to believe, that any record book of warrants was lost. The plaintiff also offered in evidence the certificate and grant of *Franklin's Delight and Ruth's Garden*, surveyed for *Thomas Franklin* on the 1st of October 1729, lying in the fork of *Gunpowder* river, and on the N side of the S branch of said river, on the head of a branch called the *Water Full Branch*, &c. and that they were truly located on the plots as located by the defendant; and also that the grantee was the same person who is grantee in the deed from *Clark* to *Franklin*. Also the certificate of the tract of land called *Gibson's Ridge*, surveyed the 19th of September 1683, for *Miles Gibson*, lying on the S W branch of *Bush* River; and proved by a witness sworn, aged 61 years, that he has been well acquainted with the last mentioned tract of land for 37 years, and that no person of the name of *Franklin* has held or possessed any part of it during that time. That before 1767 the whole of the said land was possessed by *Thomas Bond*, &c. who were and had been in possession thereof for 45 years and upwards, and held and claimed the same under purchases from *Gibson*. That the said land lies now in *Harford* county, and about 15 miles from where *Franklin* lived. The defendant then offered to read in evidence the said three papers, (copies of the certificates of *Gibson's Forest* and *Warner's Chance*,) to support her title to the land for which she takes defence. To the reading of the said three papers to the jury the plaintiff objected. But the court did permit the said certificates to be read to the jury, to be determined by them whether they were or were not genuine. The plaintiff excepted.

3. The plaintiff then prayed the opinion of the court, and their direction to the jury, that from the evidence the jury are not at liberty, and cannot presume that patents issued for *Gibson's Forest* and *Warner's Chance*. Which opinion the court refused to give. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Key and Winder*, for the Appellant, cited in their argument on the first bill of exceptions, *Peake's Evid.* 70. *Chitty on Bills*, 402. *Owings vs Norwood's Lessee*, 2 Harr. & Johns. 96. *Faulkner vs Eddy's Lessee*, 1 Binny's Rep. 188; and *Oneale vs Lodge*, 3 Harr. & M'Hen 433. On the second bill of exceptions, they cited *Chitty on Bills*, 402.

*Martin, Harper and Kell*, for the Appellee, on the first bill of exceptions, cited *Gittings's Lessee vs. Hall*, 1 Harr. & Johns. 18. *Ford vs Lord Grey*, 6 Mod. 44. 11 Vin. Ab. tit. *Evidence*, 57, pl. 9. *Loff's Galb.* 102, 103; and *Carroll's Lessee v Llewellyn*, 1 Harr. & M'Hen 164. On the second bill of exceptions they cited *Lloyd vs Gordon*, 2 Harr. & M'Hen. 254. *Carroll's Lessee vs Norwood*, 4 Harr. & M'Hen. 287. *Peake's Ev.* 23. Vin. Ab. tit. *Evidence*, 97. *Tolly's Lessee vs Ford*, 1 Harr. & Johns. 413. *Boreing's Lessee vs Singery*, 4 Harr. & M'Hen. 398. And on the third bill of exceptions they cited *Co. Litt.* 6. *Gilb. L. E.* 97, 100. *Hall's Lessee vs Gough*, 1 Harr. & Johns. 119; and *Carroll's Lessee vs. Norwood*, 4 Harr. & M'Hen. 287.

CHASE, Ch. J. delivered the opinion of the court. In actions of ejectment to recover the possession of land, it is incumbent on the plaintiff to show a grant of the land from the proprietary. To prove such grant he must produce the patent, or a copy under seal. This is the general rule, and must be generally adhered to, because there can be no recovery in ejectment without showing a legal title in the plaintiff, which cannot be done without producing a grant from the proprietary.

The cases in which this general rule has been deviated from, and in which secondary evidence has been resorted to, and admitted, for the purpose of obtaining the direction of the court to the jury to presume and find a grant, rest on strong facts and circumstances, evincing an equitable right to the land—an incipient title from the proprietary, and length of possession in conformity thereto—mesne conveyances and wills, transmitting the right from the taker up to the plaintiff.

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In actions of ejectment the producing the grant of the proprietary is the first step in deducing title; if that is wanting, and inferior testimony is resorted to for presuming a grant, the foundation must be laid by stating and combining all the facts and circumstances existing in the case, on which the prayer to the court is to be made for their direction to the jury, to presume and find a grant.

In this case, to repel the plaintiff's title, an attempt is made by the defendant to prove an antecedent grant, without producing it, or giving any evidence that such grant ever existed, without showing an incipient title, or proof that the records of the land office were lost or destroyed, and without showing any rightful possession accompanying the defendant's claim.

Length of possession is the great and leading fact in presuming grants and deeds, and without which no grant or deed can be presumed.

There are no facts stated in the *first* bill of exceptions, by which the right and possession of the proprietary could be divested. It is not stated that *Clark* was ever in possession of the land; and if he was, he was an intruder, and his deed could not operate to transfer any right to the land, for he had no right or interest to transmit; and the entry and possession of *Franklin* under *Clark's* deed, was an intrusion, the land being vacant land. The proprietary continued in possession until the act of confiscation; and the acts for appointing commissioners vested the right to the land, and the actual seisin and possession, in the state, which continued in the state until the grant made to *Cockey*, the lessor of the plaintiff.

The court are of opinion, that the deed from *Clark* to *Franklin*, and the certificate of the receipt for the alienation fine endorsed on that deed, are not legal and competent evidence; and that the court below erred in admitting the same to be read to the jury to show title in the defendant to the land in question, and do dissent from the opinion expressed in the *first* bill of exceptions.

It is the exclusive right of the court to decide on the legality and competency of all testimony, which is to be read or given to the jury; and this court are of opinion, that the court below erred in allowing the three papers, purporting to be copies of certificates for *Gibson's Forest* and *Warner's Chance*, to be read in evidence to the jury, the same not

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having been certified by *Thomas Jennings* under the seal of the land office, and the same being without date, and the court below having referred the same to the jury to determine whether they were genuine or not. This court dissent from the opinion expressed in the *second* bill of exceptions.

It of right belongs to the court to determine on the legal sufficiency of the facts and circumstances which will warrant the jury in presuming and finding a patent; and this court are of opinion, that the court below erred in not directing the jury that the proof in this case was insufficient in law for the jury to presume a grant from the proprietary, and they dissent from the opinion in the *third* bill of exceptions.

GANTT, J. dissented from the opinion of this court as to the *second* and *third* bills of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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DENT'S ADM'R. VS. SCOTT.

Where it appears by the record that before the defendant's impanelment, and afterwards in the first plea by him pleaded, he came and defended the wrong and injury, &c. such defence need not be repeated in the other pleas by him pleaded.

If the prior counts in a declaration in *assumpsit* set out a consideration, and the last count refers to them, and is founded on the consideration specified in them, it incorporates so much thereof in the last count as to render it valid.

APPEAL from *Baltimore* county court. *Assumpsit*, brought by the appellee against the appellant on the 14th of March 1801. The declaration contained the following counts: *First*. "That whereas on the 15th day of April in the year 1794, at *Baltimore* county aforesaid, in consideration that *Scott*, at the special instance and request of *Dent*, in his life-time, would deliver to *Dent* 100 barrels of superfine flour, and 50 barrels of fine flour, at or before the 15th of July of the same year, he, *Dent*, in his life-time, then and there undertook and promised *Scott* to pay him the sum of \$8 for each and every barrel of said flour, at two months next after the delivery thereof; and that he, *Scott*, confiding in the promise of *Dent*, so made by him in his life-time, afterwards, to wit, on the 15th of July 1794, at the county aforesaid, did deliver to *Dent*, in his life-time, 100 barrels of superfine flour, and 50 barrels of fine flour, whereof *Dent* in his life-time afterwards, to wit, on the same day and year last mentioned, at the county aforesaid, had notice; and by reason of the premises, and according to the said promise and assumption of *Dent*, so made by him, he, *Dent*, in his life-time, became liable to pay, and ought to have paid, to *Scott*, the sum of \$8 for each and every of the said 100 barrels of

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superfine flour, and 50 barrels of fine flour, at two months next after the 15th of July 1794, to wit, at" &c. *Second.* And whereas afterwards, to wit, on the same day and year first aforesaid, at the county aforesaid, the said *Dent*, in his life-time, accounted, together with the said *Scott*, of and concerning divers other sums of money before that time due and owing from the said *Dent* in his life-time, to the said *Scott*, and in arrear and unpaid, and upon that account he the said *Dent* was then and there found in arrear to the said *Scott* in other large sum of money, to wit, the sum of £225 like money; and being so found in arrear, he the said *Dent*, in his life-time, in consideration thereof afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, took upon himself, and then and there promised the said *Scott* to pay him the said last mentioned sum of money, when he the said *Dent* should be thereto afterwards requested." *Third.* "And whereas afterwards, to wit, on the same dame day and year first aforesaid, at the county aforesaid, the said *Dent*, in his life-time, was indebted to the said *Scott* in other £225 like money, for other 100 barrels of superfine flour, and 50 barrels of fine flour, before that time sold and delivered to the said *Dent*, in his life-time, and at the special instance and request of the said *Dent*; and being so indebted, he the said *Dent*, in his life-time, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, in consideration thereof assumed upon himself, and then and there promised the said *Scott* to pay him the said last mentioned sum of money when he the said *Dent* should be thereto afterwards required." *Fourth.* "And whereas afterwards, to wit, on the twentieth day of September, in the year eighteen hundred, at the county aforesaid, the said several sums of money being due as aforesaid, and then unpaid to the said *Scott*, by the said *Dent*, at the time of his decease, he the said *Dent* then being dead, he the said *Simpson*, to whom, together with a certain *Hannah Dent*, administration of all and singular the goods and chattels, rights and credits, which were of the said *Dent*, at the time of his death, were in due form of law committed, and the said *Hannah* then being deceased, and the said *Simpson* then being surviving administrator as aforesaid, and then having in his hands unadministered assets of the estate of the said *Dent*, deceased, a large sum of money, to wit, the sum of £1000 like money, at

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the county aforesaid, sufficient to discharge, and liable to pay, the said several sums of money due as aforesaid to the said *Scott*, and the said administration then being in full force and unrepealed, he the said *Simpson*, as administrator aforesaid, in consideration thereof afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, assumed upon himself, and then and there, as administrator aforesaid, promised the said *Scott* to pay him the said several sums of money when he the said *Simpson* should be thereto afterwards requested." The defendant pleaded three pleas—1. "And the said *Simpson*, by *Philip Moore* his attorney, comes and defends the wrong and injury whence, &c. and says that the said *Dent*, in his life-time, and the said *Simpson*, since his decease, did not, nor did either of them, undertake and promise, in manner and form as the said *Scott* hath above thereof complained against him the said *Simpson*; and of this he puts himself upon the country, and so forth; and the said *Scott* in like manner, and so forth." 2. "And for further plea in this behalf as to the supposed promise in the said *first count* of the said declaration mentioned, the said *Simpson*, by leave of the court here first had and obtained, according to the form of the statute in such case made and provided, says that the said *Scott*, his action aforesaid against him to have or maintain ought not, because he says that the cause of action in the said *first count* in the said declaration mentioned, did not accrue to the said *Scott*, at any time within three years next before the day of suing out the original writ in this cause; and this he is ready to verify, wherefore he prays judgment if the said *Scott* his action against him the said *Simpson* to have or maintain ought, and so forth." 3. "And for further plea in this behalf as to the supposed promises in the *second* and *third counts* of the said declaration mentioned, the said *Simpson* by like leave," &c. "says, that the said *Scott* his action aforesaid against him the said *Simpson* to have or maintain ought not, because he the said *Simpson* says, that the said *Dent*, in his life-time, did not undertake and promise, in manner and form as he the said *Scott* hath above thereof complained against him the said *Simpson*, at any time within three years next before the day of suing out the original writ in this cause; and this he the said *Simpson* is ready to verify: wherefore he prays judgment if the said *Scott* his action

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aforesaid against him the said *Simpson* to have and maintain ought, and so forth." The plaintiff entered a special demurrer to the 2d and 3d pleas, and assigned for causes of demurrer—1. That the defendant in his 2d and 3d pleas hath altogether omitted the words "*comes and defends the force and injury when, and so forth.*" 2. That the defendant in his 2d and 3d pleas, hath plead the same, and the matters therein contained in bar, without beginning the same with a defence, and in the same pleas hath made no defence. The defendant joined in demurrer; and the county court at February term 1804, ruled the demurrer good. A verdict was given for the plaintiff on the issue to the first plea, and damages assessed, &c. judgment thereon *de bonis intestatoris, si non*, &c. From which judgment the defendant appealed to this court.

The cause was argued at the last term before CHASE, Ch. J. BUCHANAN and GANTT, J.

IV. *Dorsey*, for the Appellant. This is a plain case, in which it is unnecessary to cite authorities. It is admitted that the defendant must take defence, this he does immediately on his appearance, and this record states that the defendant "*comes and defends the force and injury when, and so forth, and prays leave to imparle,*" &c. This is a full defence, and it need not be repeated. In 3 *Blk. Com.* 296, it is said, that "it is incumbent on the defendant within a reasonable time to make his *defence*, and to put in a *plea*," showing that it is not necessary that the defence should be in the plea. *Co. Litt.* 127, is to the same effect. But if it is necessary that there should be defence taken in the plea, the plea might have been refused for that defect, but being accepted, it is made good, and the defect cannot be taken advantage of by special demurrer. *Ferrer vs. Miller*, 1 *Salk.* 217. It is admitted that defence must be taken in some part of the record. It has been done in this case on the appearance of the defendant, and also in his *first* plea. Every thing is admitted to give jurisdiction to the court. If the declaration contains *four* counts, then the *fourth* count has not been answered by the pleas of the act of limitations. Where there is a special demurrer the first fault may be resorted to. Here it appears that the *third* count, if there are only three, is defective, for there are two distinct promises alleged in the same count; first the intestate's promises and

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then the administrator's. This is a form of pleading which is not allowed, as no one plea which the defendant could plead would answer the case. If it is considered that there is a *fourth* count, then no judgment can be given on it, because it is defective. Each count must be a full declaration of itself, and must not depend upon any other count. The *fourth* count speaks of *several* sums of money, referring to all the antecedent counts, so that take the count alone and there is no certainty in it; for each count must contain a distinct cause of action. 5 *Bac. Ab. tit. Pleas and Pleadings*, (B) 328, and the cases there cited. The *fourth* count is defective, and there is no consideration expressed in it to support a promise. This count was intended to take the case out of the act of limitations, but being defective, and there being a general verdict, the judgment must be reversed. The proper form of a declaration, on a promise made by an executor or administrator, may be seen in *Secar vs. Atkinson's Adm'r*. 1 *H. Blk. Rep.* 102, 108, and 1 *Harr. Ent.* 179, 161, 162.

*Kell*, was to have argued for the Appellee.

*Curia adv. vult.*

CHASE, Ch. J. now delivered the opinion of the court. The court are of opinion, that the *second* and *third* pleas of the act of limitations were well pleaded, and that the court below erred in giving judgment for the plaintiff on the demurrer to those pleas.

The court are also of opinion, that the judgment on the verdict be affirmed with costs, the court being of opinion that the last count in the declaration is substantially good, having reference to the precedent counts, and which is founded on the considerations specified in the *first*, *second* and *third* counts in it, and having incorporated so much thereof in the same as is necessary to render that count valid in law.

BUCHANAN, J. I am of opinion, that the causes assigned for demurrer to the *second* and *third* pleas of the defendant below, are not available in law, and that the court erred in giving judgment for the plaintiff below on the demurrer.

Full defence was made before imparlance, and is again set out in the *first* plea; and after defence is once well

made, it is not necessary to repeat it in every plea. Moreover, I think the *fourth* count in the declaration is bad. The cause of action is not sufficiently set out, and can only be ascertained by reference to the preceding counts, which reference shows that it is for the same sums of money mentioned in the other counts, and in fact blends the three preceding counts into one; whereas every count in a declaration should be distinct, and should set out a separate cause of action. I am therefore of opinion that the judgment ought to be reversed.

JUDGMENT AFFIRMED.

## ROACHE VS. PENDERGAST.

JUNE.

APPEAL from Baltimore county court. *Assumpsit* by the appellee against the appellant. The declaration contained two counts, one for *money had and received*, and the other for *money lent*. The defendant, in the court below, pleaded *non assumpsit*, and *an account in bar*, which he filed and offered to set off, &c. General replication thereto, and issues joined. At the trial the plaintiff produced as a witness one *Garrett Rice*, who proved that the plaintiff advanced to the defendant \$150, to be employed as a capital in trade, \$50 whereof to be considered as the plaintiff's share, another \$50 to be considered as the defendant's share, and the remaining \$50 to be considered as the witness's share. That three persons were to share in the profits arising in the course of their joint trade, which was to continue for an indefinite period; and that on the dissolution of the partnership, the plaintiff was to be entitled to receive his \$150, \$50 from the defendant, and \$50 from the witness, exclusively of his one third of the profits which might be made by the partnership, and also whether there should be a profit or loss in their business. The witness also proved that he was present when the plaintiff applied to the defendant for an account of the profits, which the defendant refused, alleging that the plaintiff was not entitled to any part of the profits, but paid the plaintiff a sum of money, the amount whereof he did not know, it being in

In *assumpsit* for money had and received, and for money lent, a witness proved that the plaintiff advanced to the defendant \$150, to be employed as a capital in trade, \$50 to be considered as the plaintiff's share, another \$50 as the defendant's share, and the remaining \$50 as the witness's share. Those three persons were to share in the profits arising in the course of their joint trade, which was to continue for an indefinite period; and on the dissolution of the partnership the plaintiff was to be entitled to receive his 150 dollars, 50 dollars from the defendant, and 50 dollars from the witness, exclusively of his one third of the profits which might be made by the partnership. The plaintiff applied to the defendant for an account of the profits, which the defendant refused, alleging that the plaintiff was not entitled to any part of the profits, but paid

the plaintiff a sum of money in part, but less than the sum originally advanced by him. The county court directed the jury, that these facts amounted to a dissolution of the partnership; but on appeal — Held that it ought to have been left to the jury to decide, whether from the facts and circumstances proved, the partnership was dissolved.

Held also, that the witness testified to an undertaking distinct from the partnership, which might be enforced in a court of law by an action of *general indebitatus assumpsit*, and that the witness was competent to prove such an undertaking.

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part of the sum originally advanced by the plaintiff, but he believed it to be less than the \$150 advanced as aforesaid. The witness also proved, that in a conversation between him and the defendant, the defendant stated that he would raise an account against the plaintiff, which would more than extinguish the \$150 advanced by the plaintiff at the commencement of the partnership; provided the witness would swear to it. The witness also proved, that after the commencement of the partnership, and previous to the defendant's refusal to account, he continued to live with the defendant, who had the management of the business, and that while living with the defendant he, as a partner, collected sundry debts owing to the concern. The defendant then prayed the court to direct the jury, that *Rice*, the witness produced on the part of the plaintiff, was not a competent witness; and also, that if the jury should believe the foregoing facts to be true, that in point of law they constitute a partnership, and that it is not competent for the plaintiff, in the present form of action, to recover against the defendant. Both of these directions the county court, (*Nicholson*, Ch. J.) refused to give; but directed the jury, that the refusal by the defendant to exhibit an account of the profits, alleging that the plaintiff was entitled to no part thereof, and the payment by him to the plaintiff of a part of the original sum advanced amounted to a dissolution of the partnership, and that upon its dissolution the plaintiff had a right of action in his individual capacity against each of the other copartners in their individual capacity, for the sum of \$50 loaned them originally, or for so much thereof as remained unpaid at the time of the institution of the suit. The defendant excepted. Verdict and judgment for the plaintiff for \$103 damages, and costs. The defendant appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Boyd*, for the Appellant. The claim in this case was for \$50, and the verdict, and judgment thereon rendered were for \$103, a sum recovered beyond the amount which was due, except upon the principle of *profits* made in a partnership transaction; because allowing legal interest upon the sum advanced, the verdict could not exceed \$65, even supposing not a cent of money had been paid to the

plaintiff by the defendant subsequent to the advance of the \$50, which is proved not to have been the fact. The *first* objection to the opinion of the court below is, that no witness is competent to prove a partnership establishing *his interest therein*, because of the fraud which might be practised by the admission of such evidence; and the *second* objection is, that the plaintiff misconceived his remedy, the same being only in a court of chancery; because *no settlement* ever was had, or *account stated*. The plaintiff might have received, out of the copartnership, *more* than his capital and profits, and now may be indebted to the partnership, which facts only can be established in chancery. *Smith vs Barrow*, 2 T. R. 476. *Esp. N. P.* 96, and *Index*, tit. *Partnership*. The express promise to pay the \$50 loaned, is but what the law would have implied, and does not change the *mode* of discovery. The refusal to account, though it may amount to a *dissolution* of the partnership, cannot rescind the original contract, the same having been *partly executed*. *Huntt vs Silk*, 5 East, 452. It is not known but the partnership has lost instead of having made profit, and that the defendant, being the acting partner, may have paid the amount of the claims against the firm to ten times the amount of the capital advanced. By the mode of proceeding resorted to, the defendant was precluded from making every defence allowed a copartner in equity, and has applied to a court which, from its organization, cannot do complete justice to the parties. It may also be observed, that on the final liquidation of the partnership accounts, the plaintiff may appear to have not only received his proportion of the profits, but his capital, and the capital advanced to the defendant, and more, and instead of being a creditor may be a debtor of the defendant. If it should be contended that here is a special promise varying the general rights of partnership, then it is a *special contract*, and ought to have been declared on as such, and there ought to have been a *special averment* that the partnership was dissolved, whereby an action had accrued to recover the above sum of \$50, and a general *indebitatus assumpsit* will not lie. Wherever a duty is to arise, on the *happening* of a particular event, and it is uncertain *at what* time the event may take place, or that it may ever take place, this amounts to a *special agreement*; and before that duty can be enforced in a court of justice,

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there must be an averment that the event has happened on which the duty arises. As for instance if a promise be made to pay a certain sum of money on A's going to *Rome*, or if money should be lent to be repaid on A's going to *Rome*, and returning therefrom; on these events happening, the money can only be recovered by a special action on the case, and not on a general *indebitatus assumpsit*. This form of action is only applicable to cases, where the contract is executed, and the debt is *immediately* due, or, what is the same thing, payable at a time *certain* and *specified*—as in the common cases of goods sold and delivered, payable immediately, or in *six months*. But if goods should be sold to A, and payable *when* a certain *event* should take place, then this agreement is special, and must be declared on as such, and not generally. These distinctions, it is conceived, are too obvious to require authorities. But the promise made and proved in this case is nothing more than what arises by implication of law; and therefore does not vary the relative situation of the parties, or give other remedies than are provided for in the ordinary cases of partnership by a suit in chancery. Because it is obvious, that where one partner advances to his active partner the *whole capital*, on a dissolution of the same he must be charged in the settlement of the concern for the money so loaned him, and this duty arises *immediately* on the dissolution of the partnership. The express promise therefore, raises no *other* obligation, nor can be enforced in *no other manner*, than is pointed out in all partnership cases. Besides, this doctrine would lead to this inconvenience, that the rights of the parties in *the same* transaction must be determined before two forums.—First the \$50 to be recovered in a court of law, and the partnership transaction in a court of chancery; and the common law abhors the *splitting* and multiplying of suits. And what is still more inconvenient and absurd is, that on the liquidation of the partnership, on a final account the plaintiff might be found to be a debtor, which would enable the defendant to obtain an injunction, thereby generating three suits, which the proper tribunal would settle in one—an absurdity in judicial proceedings which the court surely, by every reasonable construction, will endeavour to avoid. The court will also observe, that by the plaintiff's own showing, the jury must have taken into view the profits, because the proof adduc-

ed on his part proved a receipt of a greater sum than that loaned, which is an additional proof of the impropriety of sustaining such actions in a court of common law; and which proof was a sufficient ground, in itself, to have defeated the action of the plaintiff without any other cause.

*W. Dorsey*, for the Appellee. It appears that the appellant, appellee and the witness, agreed to enter into partnership, in which there was no limitation of time as to how long the partnership should continue. The appellee loaned to the appellant, and the witness, each \$50, before the commencement of the partnership. There is no good ground of objection to receiving the evidence of the witness, because of his being one of the partners. The payment made by the appellant to the appellee was evidence of the dissolution of the partnership, because it was to be dissolved when the \$50 was paid. It cannot be a claim against the partnership, although the money was to constitute a part of the fund put into the capital. The loan was made to each partner, the appellant and the witness, in his separate capacity, and it cannot be said to be a partnership transaction, being loaned before the partnership. There is no solidity in the objection as to the form of action. If there had been a condition annexed to the payment of the money, then it must be specially averred. The dissolution of the partnership was an event that *must* take place, and it cannot be assimilated to an event which might never happen.

*EARLE, J.* delivered the opinion of the court. It appears to the court that the judge erred in his direction to the jury, "that the facts proved amounted to a dissolution of the partnership." He ought to have left it to the jury to decide, whether from the facts and circumstances proved, the partnership in question was dissolved. The dissolution of the partnership was an important point to be established by the plaintiff; for the money claimed was not due until the partnership was dissolved.

*Rice*, the witness, testified to an undertaking distinct from the partnership, which the court are of opinion may be enforced in a court of law in the form of action used, and without declaring upon a special contract between the parties.

*GANTT, J.* dissented.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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vs  
Sumvalt

In an action of slander the words charged to have been spoken were, "you are a rogue, and I can prove that you cheated at \$ out of 100 dollars" ——— *Heid*, that the words were not in themselves actionable.

WINTER VS SUMVALT.

APPEAL from *Baltimore* county court. This was an action of *slander*, brought by the appellee against the appellant. The slanderous words charged in the declaration were these: "You, (meaning the plaintiff,) are a rogue, and I, (meaning himself the defendant,) can prove that you, (meaning the plaintiff,) cheated *Mathias Sittler*, (meaning one *Mathias Sittler* of the city of *Baltimore*.) out of a hundred dollars." The general issue was pleaded, and there was a verdict for the plaintiff for one cent damages. *Motion*, and reasons in arrest of judgment. 1. Because the words spoken had no reference to the plaintiff in the way of his trade or business. 2. Because they were not in themselves actionable. The county court overruled the motion, and rendered judgment on the verdict for the plaintiff. The defendant appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Kell*, *Winder*, and *McMechen*, for the Appellant, cited 1 *Com. Dig.* tit. *Action*, (F. 7.) 268. *Ludwell vs Hole*, 1 *Stra.* 696. *S. C.* 2 *Ld. Raym.* 1417. *Davis vs Miller*, 2 *Stra.* 1169. *Wake vs Chapman*, *Hardres's Rep.* 8; and *Cockaine vs Hopkins*. 2 *Lev.* 214.

*Scott*, for the Appellee.

JUDGMENT REVERSED, AND JUDGMENT ON THE VERDICT ARRESTED.

JUNE.

COLVIN VS. WILLIAMS.

The sale of bank stock is within the statute of frauds of 29 Car II, ch 3. A broker who disposes of such stock for another, is to be considered the agent of both the owner and the purchaser.

APPEAL from *Baltimore* County Court. *Assumpsit*. The declaration contained five counts; the first, that the plaintiff, (the appellee,) was possessed of two shares of stock of the Bank of *Baltimore*, of the value of \$1000, of which the defendant, (the appellant,) had notice, and in consideration that the plaintiff, at the special instance and request of the defendant, would sell to him the said two shares, and that the plaintiff would, in pursuance of such sale, transfer the stock to the defendant on, &c. he undertook, and then and there promised the plaintiff to pay him the sum of \$900, it being the rate or sum of \$450 for

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each share of the stock, when requested. The plaintiff averred, that he, confiding in the promise and undertaking of the defendant, afterwards, &c. did sell to the defendant the said stock, and that the plaintiff hath always been ready, and still is ready, to transfer the said stock in due form of law to the defendant. The *second* count, general *indebitatus assumpsit*, for two shares of stock, &c. sold by the plaintiff to the defendant. The *third* count, *quantum meruit*, for two shares of stock, &c. The *fourth* count, similar to the *first* count, with an averment that he offered to transfer the stock, &c. which the defendant refused to accept, &c. The *fifth* count was a similar count, omitting the averment of an offer to transfer, &c. The general issue pleaded. At the trial the plaintiff offered evidence, that the defendant, having applied to *Thomas Barklie*, who was a known public broker residing and dwelling in the city of *Baltimore*, and with whom he was in the habit of transacting business as a broker, to inform him whenever stock of the Bank of *Baltimore* was at the price of \$450 per share, as he wished to become a purchaser, but did not specify the number of shares he wished to purchase; and that a certain *Benjamin Williams*, *James Cox*, and the plaintiff, did afterwards, on the 22d day of February 1804, place with *Barklie* a quantity of shares of stock of the said bank to the number of ten, or upwards, and did authorise *Barklie* to make sale thereof at the price of \$450 per share; that *Barklie*, being thus authorised, did make out the bill of parcels, a copy whereof is as follows, viz.

“*Balto.* 22 Feb. 1804.

Mr. *Richard Colvin* Bot. of *Thomas Barklie*, Broker,  
—Shares of *Baltimore* Bank Stock a 450 pr. Share,  
to be transferred on the 23 instant. §—.”

And did send the same by *W. Boyce* his clerk, to the defendant, who received the said bill of parcels, and was informed he might have what shares he wanted; and after looking over his bank book to see what amount of money he had in bank, the defendant filled up the blank in the bill of parcels with the number seven, and carried out on the bill of parcels the amount of the seven shares in money, which he entered thereupon, and having showed to *Boyce* the bill of parcels thus filled up and extended, kept the same in his possession. The plaintiff also proved, that

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five of the shares mentioned in the bill of parcels were the property of *Benjamin Williams*, and that the remaining two shares were the property of the plaintiff, and that at the time of the delivery of the bill of parcels to the defendant, *Barklie* did not inform the defendant to whom the seven shares belonged, but that *Barklie*, on the 23d of February 1804, informed him that five of the shares were the property of *Benjamin Williams*, and the remaining two shares the property of the plaintiff; and that *B. Williams* and the plaintiff, on that day, offered to transfer to the defendant the seven shares; that is, the plaintiff his two shares, and *B. Williams* his five shares, upon the respective payment of \$450 for each of the shares; but the defendant refused to pay for the seven shares, declaring that he would neither accept of a transfer of the said shares, nor pay for the same. That the plaintiff was at that time a stockholder of two shares in the said bank, and *B. Williams* was at that time also a stockholder of five shares, and that the plaintiff did tender to the defendant the two certificates of his two shares, and *B. Williams* the five certificates of his five shares, on the morning of the 23d of February 1804, which the defendant refused to receive. The plaintiff then moved the court to direct the jury, that this testimony was sufficient to maintain the *first*, *fourth* and *fifth* counts of the plaintiff's declaration. The court, (*Nicholson*, Ch. J. and *Hollingsworth*, A. J.) gave the direction. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The case was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*W. Dorsey*, for the Appellant. 1. The plaintiff below ought not to have recovered on the *first* and *fifth* counts of his declaration, and it is doubtful whether he could recover on the *fourth* count. In the first count it is not stated that there was a tender of the shares. 2. By the statute of frauds the contract was not-binding, unless part of the goods was received, or some note or memorandum in writing given. There must be a contract signed by the party to entitle the plaintiff to recover. Here is a mere sketch of a writing, neither filled up, nor the shares delivered. It is clear that the requisitions of the statute have not been complied with. The intention of that statute was to

prevent verbal agreements from being set up. It may be said that *Barklie* was the agent of both parties; and if so, yet the agreement is not such as the statute contemplates. It does not state the number of shares, although the price is stated. This is a material omission. 3. If the agreement is obligatory, yet there is a material variance between the declaration and the proof. The evidence is the sale of *seven* shares, and the declaration is for *two* shares. 4. There was no objection that *Barklie* was a broker, and he might have sued for the seven shares. If this action is correct, seven actions might have been brought; and if this could be done, the statute of frauds would be evaded. There is no evidence on the bill of parcels who the seller was. The action ought to have been in the name of *Barklie*.

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*Harper*, for the Appellee. Although in some cases the agent may maintain an action, yet in every such case the principal or owner may sue. There is a double remedy given. The usual mode is for the owner to sue in his own name, and this is done every day. There are many sales where the principal is not known in the transaction, where it is effected by an agent or vendue master. If a note is given to the agent, he may sue, but if there is no note, the principal can sue. This is necessary in all sales by agents. *Barklie* is known to be a broker, and there being no note in this case, the agent, could not sue. It is a special contract, made through the agent, for the respective shares. The shares are not jointly the property of all the owners of shares put in the hands of a Broker for sale, and a joint action could not be maintained. It was a several interest in the whole. If there had been but *one* share, then it would have been the property of all. This is the case of several persons who happen to employ the same agent to sell their stock. In the proof it appears, that at the same time there was a special contract for other shares sold to the same person. It is a special contract with the plaintiff for two shares, and with *B. Williams* for five shares, neither having an interest in the shares of the other. This is not a contract within the statute of frauds. It is for the sale of shares of stock, and is for a kind of property which is not embraced by that statute. The 17th section of the statute

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says, that "no contract for the sale of any *goods, wares or merchandises*," shall be good, &c. The question is, whether bank stock was contemplated by that statute? It speaks of *goods*, in contradiction to *real estate*. Would it embrace *lease-hold estate*? The term *goods* is to be taken in a restricted sense. If the word *goods* was alone used it might be doubtful, but the three words are to be taken together, and they were not intended to apply to stock in a Bank. This point has not been finally settled, and is open for decision. The judges in *England* are divided in opinion. 1 *Com. on Contr.* 88 to 91. 'This was a contract executed—There was a complete sale, and such an one as the defendant could be enforced to perform in a court of equity. The formality was only to be complied with, but the sale was complete, and the stock was vested without a delivery. The sale of a horse at a stable is good without a delivery, and an action may be brought for the horse, if there is no delivery. The defendant had such a right which he could enforce the performance of. The offer to sell was accepted and agreed upon. It was a complete sale. The transfer could only be made in a particular way, and was not a condition precedent to the payment of the money. If the sale of bank stock is within the statute, then here is a note or memorandum in writing. The bill of parcels was in the hand-writing of *Barklie*, the agent of both parties. The defendant filled up the blanks, and though he put it in his pocket, will it be said that it would bind the plaintiff and not the defendant? The defendant, by filling up the blanks, made it his writing. The statute does not say any thing about a *signature* or a *delivery*.

THE COURT said, that the sale of bank stock is within the statute of frauds; and that *Barklie* was the common agent of both the appellee and appellant.

JUDGMENT AFFIRMED.

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APPEAL from a decree of the Court of Chancery. By the record it appears, that a bill was filed on the 15th of June 1772, by *Amos Garrett*, in his own right, and as administrator, with the will annexed, of *Peter Dicks*, against *Jacob Giles*. The objects of the bill being stated in the decrees of the chancellor, and in the opinion delivered by this court, they are here omitted. A *subpena* and injunction issued, as prayed for by the bill. At May term 1774, the defendant put in his answer, to which at May term 1782, the complainant excepted, and in 1784 the chancellor ruled the exceptions good, and ordered the defendant to make a more full and perfect answer. The death of *Giles* was afterwards suggested, and a bill of revivor filed against his executors, devisees and representatives. The executors answered, and in 1785 a commission issued by consent to certain persons to audit the accounts between the parties. In 1789 the death of *Garrett* was suggested, and a bill of revivor filed by *Benedict Edward Hall*, as executor of *Garrett*, and as administrator *de bonis non* of *Dicks*, against the executors, devisees and representatives, of *Giles*. In 1790 the auditors made their report, Commissions issued, and testimony was taken and returned. In February 1796 an amended bill of revivor was filed by the complainant, stating that the original bill was filed on the 2d of December 1771, against *Jacob Giles*, and against *Nathaniel Giles*, in his own right and as administrator of *John Giles*, which, on the death of *Jacob*, was revived against his executors, &c. who have become parties. That *Nathaniel* never answered, and is now dead, and his executors are also dead, and no administration on his estate, but that he left four daughters his representatives, That

On a bill in chancery filed in 1772 by one partner, in his own right, and as administrator of another partner, against a third partner, to be relieved on the ground of fraud and imposition against a bond passed by the complainant, on a settlement of the partner's accounts, to the defendant, in 1786; to have an account of the profits of certain works carried on in partnership from 1751 to 1764; and, as representative of the other partner, to have an account of the share of profits, from which that partner was arbitrarily excluded, during the same period. Held, that from the facts in the case, the settlement in 1786 must be taken to be fair, and if liable to any exceptions, it can only be on the ground of error or mistake; and the complainant cannot only be permitted to surcharge and falsify, and that no further than the specifications in his bill. The *onus probandi* is on him, and after a voluntary settlement by the parties themselves of long and intricate transactions, which cannot now be fully known or unravelled; the frequent payment of money upon the bond passed on the settlement; and the death of the only material witness—the surcharge or falsification must be clearly demonstrated and proved before it can be allowed—and from a strict examination of all the proofs, it does not appear that there were any errors or mistakes in the settlement, or that the complainant was in any manner injured. That with respect to the other partner, (for whom profits are claimed by the complainant as his administrator,) it appears that he was left out of the new partnership of 1753, when an account was opened against him, in which he was charged with his proportion of the money advanced by the other partners in the former partnership; that he made considerable payments in money on that account, and in 1754 gave his note for the balance, which was paid to the order of the complainant, and his account closed. He died in 1760, and never claimed any interest in the partnership after 1753, and there is no evidence that he considered himself, or was considered by others as a partner. After which acquiescence and lapse of time, a court of equity will presume that his interest was relinquished.

Where the court of appeals reversed a decree of the court of chancery, and directed that the defendant's account with the complainant, and that the chancellor have the account stated by the auditor &c. which having been done, and a decree passed for payment of the sum stated to be due from the defendant to the complainant—an appeal lies from such decree to the court of appeals.

An act of assembly directing the court of appeals to hear and determine the matter of a former decree of that court.

An appeal lies from an interlocutory decree of the court of chancery.

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*John Giles* was son of *Jacob Giles*, and died in the lifetime of his father, intestate, and without issue, and since the death of *Nathaniel* there has been no administration on his estate. That certain of the devisees and representatives of *Jacob* are since dead, none of them having ever answered the bill of revivor against them, although commissions had issued by consent, and testimony had been taken. He prayed that the suit might stand and be revived against the executors, devisees and representatives, of *Jacob*, the representatives of *Nathaniel*, and the representatives of the deceased representatives, &c. On the coming in of the answers of all the devisees and representatives, it was agreed that all the testimony which had been taken, should be read in evidence in the same manner as if all the parties had regularly appeared and answered before it had been taken. The defendants agreed to release to the complainant all claim on the bond from *Garrett to Giles*, stated in the bill of complaint. The case was argued by counsel, and submitted.

HANSON, Chancellor, (22d December 1797.) The original bill had three objects, viz. For the complainant to be relieved on the ground of fraud and imposition against a bond by him passed, on a settlement of accounts, to the defendant; to have an account of the profits of certain works carried on in partnership, the complainant's share whereof was by him released in consequence of the same fraud and imposition; and lastly, as representative of another partner to have an account of the share of profits from which the said partner was arbitrarily excluded. The chancellor cannot omit to remark on the long continuance of this cause. For many years the want of progression appears to have been owing to the neglect of one or both of the parties. Abatement by death, then took place, in the ordinary course of human events. After a revival of the suit, a want of attention or negligence permitted another suspension of proceedings, and at length other deaths, with the operation of the descent law, rendered it extremely difficult, even with proper attention and exertions in those concerned, to have all proper parties before the court. This is not perhaps the worst consequence of delay. After such a lapse it was not to be expected that those facts which, in the beginning, living

witnesses might be produced to prove, can now possibly be established, when these facts are supposed to have taken place, at least fourteen years before the filing of the original bill. The truth is, that the complainant has produced nothing to be called proof, to establish the material allegations of the bill; although there are certainly circumstances to induce a suspicion of their truth. But however positive these allegations may be, those circumstances cannot be considered sufficient to set aside a bond passed in the year 1756, fourteen years before the date of the cause, on a settlement of accounts, after an investigation of several days between two men versed in business, neither of whom at the time, appear to have reposed any real confidence in the other. The chancellor then is clearly of opinion, that the complainant has shown no title to relief, as the executor of *Garrett*, on the ground of fraud and imposition, and if the complainant might still be permitted to surcharge and falsify the account on which it is supposed the bond was given, this could not be done without amending the bill, and pointing out the particulars; but to do this he has not thought proper to ask leave. With respect to the third object of the bill, the chancellor cannot think that the complainant, as administrator *de bonis non* of *Peter Dicks*, has established facts to entitle him to relief; although it is not improbable, that had *Dicks*, or his representative, brought suit sometime during the 16 or 17 years, which elapsed between the time when it is supposed he was injured by the arbitrary conduct of *Garrett* himself and *Giles*, and the date of *Garrett's* suit, he might have recovered something, either at law or in equity. On a most laborious and anxious investigation of this cause, the chancellor could not otherwise than feel a degree of distress and embarrassment. By the last act of the defendants' solicitor, he is enabled to do that, which probably arbitrators would have done thirty years ago, or at least do as much in the complainant's favour, as such arbitrators would have done. "It is agreed, that to facilitate the settlement of the cause, the defendants will release all benefit of the bond passed by *Garrett* to *Giles*;" and it is impossible, the chancellor conceives, that, at this time, on the proceedings in this cause, any tribunal whatever would decree more in the complainant's favour than by relieving him against that bond. Let the re-

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port of the respectable auditors in this cause, appointed by the agreement of the parties, be attended to. *Decreed*, that the injunction, heretofore issued in this cause, be revived, and that the defendants, and each of them, be and they are hereby perpetually enjoined not to proceed to law on the bond passed by *Amos Garrett* in the year 1756, against which the said *Amos*, by the original bill in this cause, prayed relief. Also that each party bear his own costs, &c.

From this decree the complainant appealed to the court of appeals.

THE COURT OF APPEALS, [*Rumsey*, Ch. J. *Muckall* and *Jones*, J.] at June term 1800, after hearing counsel upon the appeal—"Decreed, that the decree of the chancellor be reversed, and that the complainant be allowed the costs of his appeal. That the defendants account with the complainant, as executor of *Garrett*, for five twelfth parts, and with the complainant, as administrator *de bonis non* with the will annexed of *Dicks*, for two twelfth parts of the stock and profits of *Cornwall* furnace and *Hopewell* forge in *Pennsylvania*, from the 31st of December 1753, to the expiration of the lease on the 18th of June 1765, if stock shall have been taken at that time, if not, at such time thereafter as stock shall appear to have been first taken; and that the account of said stock and profits be stated by the auditor of the court of chancery. That the chancellor pass such decree and order as shall be necessary to have the account stated in manner aforesaid, and on return thereof to take such order, and pass such decree, as may be necessary to compel the defendants to pay to the complainant the amount of stock and profits found due to him in each of his capacities as aforesaid, with interest thereon from the 18th of June 1765, if stock shall have been taken at that time; if not, at such time thereafter as stock shall appear to have been first taken, till paid, and costs." In consequence of this decree the chancellor did, on the 23d of October 1800, by his order direct, that the defendant account with the complainant as by the decree of reversal is directed, and that the auditor state an account or accounts between the parties accordingly. The auditor made his report and statement of accounts to October term 1801. The defendant excepted to the auditor's

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report upon various grounds. Some of the exceptions were ruled good by the chancellor, and the auditor was directed to correct his report. The auditor having corrected his report, the same was ratified by the chancellor, stating that there was due to the complainant from the defendants, on the 1st of August 1801, provided they have assets, &c. the sum of £44,818 11 6, in which sum interest is included to that day, and of which sum five parts of seven are due to the complainant as executor of *Garrett*, and the other two parts as administrator *de bonis non* of *Dicks*. The chancellor afterwards by his decree directed that each of the defendants account with the complainant for the amount or value of the property which is or hath been in his or her hands, and which hath come to him or her, claiming mediately or immediately under *Jacob Giles*, deceased, &c. Reports were accordingly made by the auditor. To which there were various exceptions. Some of which were allowed, &c. and the chancellor, on the 28th of November 1803, decreed, that *A. Giles*, one of the defendants, pay to the complainant the sum of £3,295 2 6, with interest from the 23d of October 1800; that *W. Smith*, one other of the defendants, pay to the complainant £2,500, with interest, &c. That *E. Giles*, one other of the defendants, pay to the complainant £750, with interest, &c. That *S. Gover* and wife, others of the defendants, pay to the complainant £717 3 9, with interest, &c. and that *Sarah Gover*, one other of the defendants, pay to the complainant £684 7 6, with interest, &c.

*Gover*, and wife, petitioned the chancellor for leave to appeal from the decree to the court of appeals; and filed a bond with sureties, to prosecute the appeal, &c.

HANSON, Chancellor, (December 23, 1803.) The chancellor has considered the petition of *Gover* and wife, and is clearly of opinion, after hearing the argument of the complainant's counsel, that an appeal properly lies in this case; and therefore that the defendants are entitled to have the prayer of their petition granted.

Nothing is better established in chancery than that an appeal lies from an interlocutory decree. It is true, that in this cause the chancellor formerly passed a final decree. But the judges of dernier resort, on an appeal, reversed his decree, and directed an account to be taken between the parties. They were of opinion then,

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that the chancellor ought to have decreed an account as they have directed. Suppose the chancellor, instead of decreeing it, had not so decreed, would not the defendants have been entitled to appeal? But suppose the defendants not to appeal from that interlocutory decree, and to have suffered an account to be taken, on which the chancellor decreed, can there be any doubt that the defendants would have been entitled to appeal; or in other words, that an appeal would properly lie in that case, and execution be stayed on filing their bond?

What then, in point of principle, is the difference between that case and the present? Why does an appeal lie in any case, unless it be, that the opinion of the chancellor, if he does wrong, may be corrected. Is it impossible that the chancellor has erred in the present instance, notwithstanding he has pursued, as nearly as he could, all the directions of the court of appeals? Most assuredly it is not. The court of appeals has only directed a general account of profits from one period to another, and to allow the complainant a certain proportion. It did not say the chancellor shall direct *certain* sums to be charged to the complainant, other *certain* sums to the defendants, and the balance to be struck and paid to the complainant. Had it so done, it might well be said, that the chancellor might be certain he had pursued its directions, and therefore ought not to stay execution on a frivolous appeal.

It surely cannot be forgotten that the auditor hath made two statements, differing in their amounts many thousand pounds, and that the defendants' counsel excepted to both accounts. Is it possible to conceive, that when the court of appeals did not direct either sum to be decreed, and did not—could not prescribe certain things to be done, from which either of the amounts, or any other certain amount should arise, and when of course the court of appeals hath not given its direction; is it possible to conceive that the defendant is not entitled, on the usual terms, to have the opinion of that tribunal, before he is compelled to pay the money decreed against him? Is it to be supposed the intent of that court, to inform the chancellor there should be no appeal from his decision, merely because they directed him to have an account stated, and to decree the sum appearing due to be paid to the complainant, and to take proper measures for carrying his de-

cree into effect? Let it be supposed that the court had plainly expressed that meaning, and the chancellor to act in obedience to its mandate—what disinterested, impartial, intelligent person is there, that would not declare the common right of a citizen to be violated? It would, in such a case, be fruitless to allege that, as in contemplation of law, the decisions of the court of appeals must be right, it ought not to be supposed to have done wrong in any case whatever.

In a word, the chancellor is most decidedly of opinion, that although in no case will he disobey the plain directions of that tribunal, given on appeal from his decision, he cannot with propriety permit an execution to be taken out against the defendants, until its decree is obtained on the appeal, or unless the defendant shall fail to prosecute it agreeably to the condition of his bond, which the chancellor hath approved.

Most true it is, and much is it to be lamented on various accounts, that this cause hath continued a length of time equal to one half of a long life. For many years no steps was taken by either party; and it was even supposed to be abandoned on one side, and almost forgotten on the other. The chancellor wishes most earnestly an end of it. But had it continued thrice as long, he could not, for that reason, deprive the defendant of what he believes to be every defendant's right; notwithstanding that he is perfectly convinced of the rectitude of his last decree on the auditor's statement, which he considers as conformable to the principles contained in the decree of the court of appeals.

The appeal being granted, the record was transmitted to this court; and during the pendency of the appeal, the act of *November 1809, ch. 87*, passed, reciting that *Samuel Gover*, and others, had represented to the general assembly, that the above cause came on for trial in the late court of appeals at June term 1800; that *Benjamin Rumsey*, *Benjamin Mackall* and *Thomas Jones*, were the judges who signed the decree given in the cause, and that *Benjamin Rumsey*, at that time, was the presiding judge of the court, and that he declared, that being nearly related to one of the parties, he could not act in the usual manner, but that if he concurred in opinion with the other judges, he would sign the decree, so as to make up the legal number of judges required for constituting the court, and

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which he did accordingly; and that the present court of appeals had ordered an argument how far the said decree was conclusive, and the petitioners had prayed that an act might pass authorising the court of appeals to hear and determine the matter of the decree of June term 1800, in the case, in the same manner as if that decree had never been made; and it appearing to the general assembly that the manner in which *Benjamin Rumsey* acted in signing the decree, without sitting in judgment in the case, was not in conformity to the spirit of the constitution; it was enacted, "that the court of appeals for the western shore be and they are hereby authorised, empowered and directed, to hear and determine the matter of the decree of the court of appeals of June term 1800, in the said cause, in the same manner as if that decree had never been made." By a supplement to the above act, passed at the same session, *ch.* 118, it was enacted, "that in the event of the court of appeals determining in the same manner as the former court of appeals, or determining that there should be an account, that then, or in either case, all the statements and proceedings that have taken place under the decree of June term 1800, shall be and they are hereby declared to stand before the court of appeals authorised to determine the case, in the same manner, and with the same effect, as if the act, to which this is a supplement, had not passed; provided nevertheless, that if the court of appeals should be of opinion that justice cannot be done between the parties by reason of the provisions of this supplement, that then and in that case they shall proceed in the same manner as they could or would have been authorised to have done if this supplement had not passed."

The appeal having been granted to this court, the cause was argued before *BUCHANAN, NICHOLSON, GANTT, and EARLE, J.* by

*Shaaff, Harper, T. Buchanan* and *Winder*, for the Appellants; and by

*Martin, Key*, and *Johnson* (Attorney General,) for the Appellee.

*BUCHANAN, J.* delivered the opinion of the court. The case appears to be this—*George Churchman, Peter Dick* and *Abraham Hare*, having possessed themselves of a

lease of certain iron works in the state of *Pennsylvania*, called *Cornwall Furnace* and *Hopewell Forge*, to continue until the year 1765, on the 13th of November 1750, took *Jacob Giles*, *John Hall* and *Amos Garrett*, into an equal partnership and interest with them in the works, in consideration of the sum of £1000 furnished by *Giles*, *Hall* and *Garrett*, to be repaid by *Churchman*, *Hare* and *Dicks*, with interest, at the end of five years, out of their proportions of the profits of the works, for which they passed their bonds.

In 1751 *Giles* and *Garrett* bought out *Hare*. In 1752 they purchased a moiety of another forge in *Pennsylvania* called *Talphahaken Forge*, and in the spring of 1753 they bought out *Hall* and *Churchman*, and thus became jointly possessed of one undivided moiety of *Talphahaken Forge*, and of five sixths of *Cornwall Furnace*, and *Hopewell Forge*.

On the 12th of June 1753, *Giles* and *Garrett* entered into new articles of copartnership for carrying on the business at the furnace and two forges, leaving out *Dicks*.

On the 13th of November 1753, another partnership was formed for carrying on the furnace and two forges, with several other branches of business, and *John Giles* and *Nathaniel Giles*, sons of *Jacob*, were taken into the concern on equal terms.

On the 12th of March 1756, the last partnership was dissolved, and a final settlement made between *Jacob Giles* and *Garrett*, in the presence and with the assistance of *David Caldwell*, when there appeared to be a balance against *Garrett* of £1106 14 1½, current money, for which sum he passed his bond to *Giles* on the day of settlement, and also gave his bond to *Giles*, conditioned to quit claim to the iron works, and all stock and profits accrued or accruing therefrom; and *Giles*, on the same day, passed his bond to *Garrett*, conditioned to correct all errors in the settlement, if any should be discovered, to indemnify him against all partnership demands, and to pay him one half of all the debts that might be collected, which in the settlement had been considered dubious or desperate. The three bonds are all in the handwriting of *Garrett*, and attested by *David Caldwell* and *John Rigby*. From which time, until a short period before the filing the bill by *Garrett*, in 1772, he continued to officiate as clerk

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and book-keeper to *Giles*; made at different times considerable payments on his bond for £1106 14 1½; and in February 1763, acknowledged in writing the account and settlement of 1756, reserving only the right to correct errors, if any.

By an act of the legislature this cause is placed in the same situation for decision in which it stood on the appeal from the decree of the chancellor of the 22d of December 1797, and presents two questions for the consideration of the court.

*First.* Whether the settlement of the 12th of June 1756, and the bonds passed by *Garrett* to *Giles*, shall be opened and set aside, and *Benedict Edward Hall*, as executor of *Garrett*, be entitled to an account of all the profits of the works from the year 1751 to 1765, and be let in for any and what proportion of the profits? And

*Second.* Whether as administrator *de bonis non* of *Peter Dicks*, he shall be let in for one sixth of the profits of the works for the same period?

With respect to the claim in right of *Garrett*, it is contended that the settlement and bonds of the 12th of March 1756, ought to be set aside on two grounds:

*First.* That they were procured by fraud, artifice, misrepresentation and threats; and

*Second.* That there are errors and mistakes in the settlement.

On the first ground of relief, it is alleged in the bill that *Giles*, becoming impatient of the rising fortune of *Garrett*, formed the fraudulent design of working him out of the concern, and of getting into his own hands the sole management and property of the works, and with that view artfully brought about the partnership of the 15th of November 1753, into which his two sons are stated to have been admitted as equal partners, without any consideration; and that in furtherance of the same project, *Garrett* was turned out of the management of the works, on the 1st of January 1754, and sent to *England* on a frivolous pretext, and *David Caldwell*, who is represented as the tool of *Giles*, and wholly devoted to his interest, appointed manager in his place.

But the fraud inferred from these transactions does not appear, and the intent ascribed to *Giles*, to embarrass and injure *Garrett*, seems to be an unfounded conjecture. The

articles of the 13th of November 1753, afford no evidence of it, and it does not appear that *Garrett* was thereby injured. The allegation that *Nathaniel* and *John Giles* were taken into the partnership without any consideration, and with a view to overbear *Garrett*, is not supported. On the contrary, the articles refer to an annexed list of stock stated to have been put in by each of the parties, and contain an express stipulation that *Nathaniel Giles*, who was an infant, should have no vote in the affairs of the company until he arrived at age.

The charge that *David Caldwell* was the tool of *Giles*, and that *Giles*, in the year 1754, fell upon the expedient of appointing him manager at the works, for the purpose of ruining *Garrett*, is equally unsupported.

By the articles of the 12th of June 1753, it was stipulated that *Giles* should be at liberty to employ another book-keeper at the end of the year, and by the articles of the 13th of November 1753, it was provided that a new clerk should be appointed on the 1st of January 1754.

These two agreements were entered into by *Garrett* with his eyes open, and the first of them at a time when no fraud is pretended to have been practised upon him. The appointment, therefore, of *Caldwell* as manager, who, it is in proof, was a man of unblemished character, will not bear the construction which is attempted to be given it. He was moreover, from the time of his appointment, on the most friendly and confidential terms with *Garrett*, as appears from their numerous letters of correspondence; and with respect to *Garrett's* mission to *England*, it appears to have been connected with their general scheme of trade; and the bill does not even state that there were any foul dealings in his absence.

The allegations in the bill that *Garrett*, on his return from *England*, wished to know the state of the works, but was put off with some trifling excuse, and that every transaction during his absence was concealed—that when he proposed to go to the works to examine the books, *Giles* alarmed him with fears that he would be arrested and imprisoned—that *Giles* peremptorily insisted on taking his son *Jacob Giles*, and son-in-law *Nathaniel Rigby*, into the partnership, and on his refusal took possession of some of the books, and ordered *Caldwell* to lock up the rest—that when he inquired of *Giles* to know the profits of the works

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for the years 1754 and 1755, he was informed, they were sunk by the debts, and that the lands and works were involved beyond their value—that at the time of the settlement in 1756, *Giles* had in his possession a memorandum book, showing the clear profits of the works for the years 1754 and 1755, to exceed £4000—that on his objecting to enter into a settlement on an account produced by *Giles* for that purpose, *Giles* abused him, and threatened him with a gaol, and that he was obliged to throw himself upon his mercy, and without examining the books or accounts, and ignorant of the state of the concern, he entered into the settlement and bonds of 1756—are all positively denied in the answer, and wholly unsupported by any proof exhibited in the cause. Nor is it probable that *Garrett*, who was a sensible discerning man, would under such circumstances of suspicion have entered into a settlement without an inspection of the books, which he was entitled to, when he could not suffer by delay, and it was not in the power of *Giles* to coerce him. Moreover, the circumstances that *Caldwell* was present and assisted at the settlement; that *Giles* offered to refer the whole business to arbitrators, who he knew would only act upon an inspection of the books; that after the settlement, he passed his bond to rectify mistakes, and continued *Garrett* in his employment as a clerk, until the year 1769, and thus put it in his power to discover the frauds and errors if any existed; that all the instruments of the 12th of March 1756, are in the handwriting of *Garrett* himself, and that he made frequent payments on his bond, irresistibly force the presumption that no fraud, violence or imposition, was practised.

The settlement then of the 12th of March 1756, must be taken to be fair, and if liable to any exceptions, it can only be on the ground of error or mistake; and the complainant can now only be permitted to surcharge and falsify, and that no further than the specifications in the bill. The *onus probandi* is on him—and after a voluntary settlement by the parties themselves, of long and intricate transactions, which cannot now be fully known or unravelled, the lapse of nearly sixteen years from the time of the settlement to the filing of the bill, the frequent payment of money upon the bond passed on the settlement, and the death of *Caldwell*, the only material witness, the

surcharge or falsification must be clearly demonstrated and proved before it can be allowed.

In this case there are but three specifications. The bill states that *Garrett* was charged in the settlement with £313 11 1½, as his proportion of desperate debts, which *Giles* has since collected or received satisfaction for; that he was charged with £129 10 1½ as his proportion of the *Talphahaken* balance—whereas there was no such balance—and with £150 as his proportion of a debt on account of the *Talphahaken* works due *Price & Brenner*, which he had before settled and paid.

These items are contained in certain general charges in the account on which the settlement was made, but are not falsified by any evidence in the cause; besides, they are more than covered by the relief decreed by the chancellor against the bond on which an injunction has been granted by consent of counsel.

The bond to correct errors makes no difference—it only contains what the law provides without it—and unless errors are clearly designated and proven, the settlement must stand; and from a strict examination of all the proofs in the cause, it does not appear that there were any errors or mistakes in the settlement, or that *Garrett* was in any manner injured.

With respect to *Dicks*, it appears that he was left out of the copartnership of the 12th of June 1753—that on the same day an account was opened against him, in which he was charged with his proportion of the £1000, advanced by *Giles, Hall & Garrett*, with interest thereon.

On the 4th of August 1754, he made considerable payments in money on that account, and passed his note for the balance to *Giles* and *Garrett*, which was carried as a debit into his general account on their books. That on the 5th of November, 1754, he was credited by the amount of that note paid to the order of *Garrett*, and his account closed. From which time his name does not appear on the books. He died in the year 1760, and never claimed any interest in the partnership after the 12th of June 1753, and there is no evidence that he considered himself, or was considered by others, as a partner. After which acquiescence and lapse of time, connected with the circumstance of his paying off his proportion of the £1000 advanced by *Giles, Hall and Garrett*, a year before it became due, and

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when, if he continued a partner, he would have been entitled, under the contract, when it did become due, to set off against it his proportion of the profits of the works, a court of equity will presume that his interest was relinquished.

Upon the whole, therefore, I am of opinion, that *Benedict Edward Hall* ought not to have an account of the profits of the works either in right of *Garrett* or *Dicks*; and that the decree of the chancellor of the 28th of November 1803, ought to be REVERSED, and his decree of the 22d of December 1797 AFFIRMED; and that the respective parties in this appeal, and in the appeal before the late court of appeals, pay their own costs by them incurred and expended in the court of chancery, in the late court of appeals, and in this court.

EARLE, J. Concurred in the statement of facts, the reasoning and opinion of Judge *Buchanan*.

GANTT, J. also concurred, except that he considered the decree of the chancellor of the 22d of December 1797, erroneous, so far as a perpetual injunction was decreed against the bond from *Garrett* to *Giles*, and that this court ought to dissolve that injunction.

NICHOLSON, J. I am opinion in this case, that *Benedict Edward Hall*, as executor of *Garrett*, is not entitled to an account, there being no such circumstances of fraud disclosed as ought to induce the court to open a settlement voluntarily made by the parties sixteen years before the bill was filed.

I am of opinion, that *Benedict Edward Hall*, as administrator of *Dicks*, is entitled to an account, as it does not appear to me that the evidence in the case is sufficient to warrant the conclusion that *Dicks* ever withdrew from the concern. Thinking, as I do, that *Dicks'* administrator is entitled to an account of stock and profits, the necessary consequence is, that I should decree the whole costs to be paid by *Gover* and wife. But as the other members of the court disagree with me in regard to *Dicks'* claim, and as to costs, it follows that I cannot sign the decree of the court.

THE DECREE OF THE COURT. The arguments of counsel in this cause having been heard, and the bill, answers, and the proceedings in the case, read and considered, the

court are of opinion, that *Benedict Edward Hall* is not entitled to an account either in right of *Amos Garrett* or *Peter Dicks*. And the injunction granted by the chancellor, on the bond from *Garrett* to *Giles* of the 12th of March 1756, having been decreed by the consent of the counsel of the defendants in the court of chancery, appearing on record, it is thereupon, this 12th day of July, in the year of our Lord 1810, by the court of appeals, and the authority thereof, adjudged, ordered and decreed, that the decree of the chancellor of the 22d of December 1797, be and the same is hereby affirmed.

It is also adjudged, ordered and decreed, that the decree of the chancellor of the 28th of November 1803, be and the same is hereby reversed, annulled and made void.

And it is further adjudged, ordered and decreed, that the respective parties in this appeal, and in the appeal before the late court of appeals, pay their own costs by them incurred and expended in the court of chancery, in the late court of appeals, and in this court.

*Jno. Buchanan,*

*Jno. M. Gantt,*

*Rd. T. Earle.*

#### NORWOOD vs. NORWOOD.

JUNE.

APPEAL from *Baltimore* county court. *Assumpsit* by the appellant against the appellee, for money laid out, expended and paid. Plea, the general issue. At the trial the plaintiff proved that an action of ejectment had heretofore been instituted in the general court, by *Charles Carroll* and others' lessee, against the plaintiff and defendant in the present action, for two tracts of land called *Enlargement* and *Brown's Adventure*. That after the institution of that ejectment, *Carroll* and others' lessee, brought another action of ejectment in the general court also against the plaintiff and defendant, for a tract called *Yates his Forbearance*, in which last action the plaintiff there obtained a verdict and judgment, against the present plaintiff and defendant, for possession of the tract called *Yates his Forbearance*, and also for the costs expended by the plaintiff in

In an action of *assumpsit* for money laid out, expended and paid by E N for S N, being for one half of the costs recovered against them in an action of ejectment, wherein they were joint defendants and made a joint defence—Held, that E N is entitled to recover altho' S N, with a view to save costs, agreed with the plaintiff in the action of ejectment, that certain old plots, on which the lands in dispute were located, should be used in evidence at the trial, but which agreement E N, refused to accede to, and insisted that new plots should be

made out, whereby a large amount of costs was unnecessarily incurred, and altho' he gave notice that he would pay no part of such costs.

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that action, amounting to £186 4 10, the whole of which was paid by the present plaintiff. The plaintiff also proved, that in the first aforesaid action of ejectment, a judgment of *nonsuit* was entered, from which there was an appeal to the court of appeals, where the same was reversed, and judgment entered for *Carroll* and others' lessee, against the plaintiff and defendant in this action, for the costs of the appeal, amounting to £58 6 4, and which costs were also paid by the plaintiff here, to the agent of *Carroll*, and others, as by a receipt exhibited. This action was brought to recover a moiety of those costs. The defendant then proved, that in the first mentioned ejectment for *Enlargement* and *Brown's Adventure*, there had been certain plots and locations made by order of the general court, which were returned and filed in that court as proceedings in that ejectment, and also that certain depositions of witnesses, relative to the boundaries and lines of those tracts of land, had been taken by consent in that action. That *William Hammond* was the legally authorised attorney of *Carroll* and others' lessee, in both of the above mentioned ejectments, and that the plots and locations, which had been made in the first mentioned action for *Enlargement* and *Brown's Adventure*, were precisely the same that must necessarily be made in the other ejectment for *Yates his Forbearance*, as far as they went, and that it would only be necessary to make some trifling additions to render them completely sufficient to try the ejectment for *Yates his Forbearance*. The defendant also proved, that *Hammond*, the attorney for *Carroll* and others' lessee, entered into the following agreement with the defendant in this action: "That the plots used in the former ejectment, which was tried between *Charles Carroll*, and company, and *Edward* and *Samuel Norwood*, shall be used in the cause now depending between the same plaintiffs, and *Samuel Norwood*, each party having liberty to make such amendments to those plots as they may think necessary." He also proved, that the plots mentioned in this agreement were the same which had been made in the ejectment for *Enlargement* and *Brown's Adventure*, and that the cause mentioned, as "now depending," in the agreement, was the ejectment for *Yates his Forbearance*. The defendant also proved, that he entered into another agreement with *Hammond*, the attorney of *Carroll* and others' lessee, "that the admissions of boundaries, proofs

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and depositions, taken in the former cause between the same parties, shall be received in evidence in the same manner as if they had been taken in the present suit." And that the depositions in the last agreement mentioned are the same depositions herein before mentioned, which were taken by consent in the ejectment for *Enlargement and Brown's Adventure*, &c. The defendant also proved that *Hammond*, the said attorney, after the two agreements had been entered into, applied to the plaintiff in this action, and desired him, in order to save costs and trouble, to enter into the same agreement with him, to which the plaintiff at the time consented, but afterwards utterly refused to do, alleging as his reason, that he never would agree to any thing which was recommended by *James Winchester*, (the present defendant's counsel,) and that new plots and locations must be made. The defendant also proved, that after the judgment of *nonsuit* was given in the general court against *Carroll* and others' lessee, in the ejectment for *Enlargement and Brown's Adventure*, *Carroll* and others' lessee, instituted another ejectment in the general court, for the two tracts of land called *The Enlargement and Brown's Adventure*, and that it was agreed on all sides, both by the plaintiff and defendants in the last mentioned ejectment, that the plots and locations, which had been made in the first suit brought for the same tracts of land, should be used in the last mentioned action for the same lands, and that the said plots were so used, and no others were ever made in the last ejectment. That when the sheriff of *Baltimore* county served a notice on the defendant, to make locations in the last suit of the three ejectments in which locations were made, he informed the sheriff that he should not make any locations in that case, nor would he pay any part of their expense. He also proved, that when the sheriff and surveyor were actually making locations, and laying down pretensions, by the direction of the present plaintiff, on the last occasion, he, the present defendant, told the sheriff and surveyor that he would have nothing to do with the locations they were making, nor would he pay any part of the expense. The defendant also proved, that the defendants in the last mentioned ejectment, recovered a judgment in the general court for the sum of £131 2 3, it being the costs of the ejectment for *Enlargement and Brown's Adventure*, in which a judgment of

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*nonsuit* was rendered against *Carroll* and others' lessee, and that of the said sum the defendant in this action received £19 1 0, alleging that he had paid to that amount, and claiming no more, and that the present plaintiff received the balance, being £112 1 3. That on the ejectment instituted for *The Enlargement and Brown's Adventure*, the defendants in that action were entitled to £39 12 0, as costs, from *Carroll* and others' lessee, which were discounted in payment of so much of the sum of £58 6 4, herein before mentioned, as costs recovered in the court of appeals by *Carroll* and others' lessee, against the present plaintiff and defendant, and is a part of the £58 6 4, stated to be paid to the agent of *Carroll* and others' lessee, by the present plaintiff, in the receipt exhibited, and that the balance of the £58 6 4, viz. £18 14 4, was paid exclusively by the present plaintiff; and that the £58 6 4, was discharged as just above stated, and not by a payment of money by the plaintiff, as the receipt purports. The defendant then moved the court to direct the jury, that if they should believe that any part of the aforesaid costs were incurred by the plaintiff unnecessarily, and contrary to the wish and consent of the defendant, and contrary to the agreements herein before mentioned between *Hammond* and the defendant, that the plaintiff was not entitled to recover in this action one half thereof from the defendant. But the court, (*Nicholson* Ch. J.) refused to give the direction to the jury; and directed the jury, that the plaintiff was entitled to recover the same, inasmuch as the sum of money, for which the present suit was instituted, was the legal costs of suit which had been expended by *Charles Carroll* and others' lessee, in prosecuting an ejectment against the present plaintiff and defendant; that for these costs a judgment had been rendered in the general court against the present plaintiff and defendant; that each was bound for the whole to the plaintiff in ejectment, by the judgment which had been rendered against them, and that if the whole amount had been paid by either, he had a right to recover a moiety from the other. That the defendants in ejectment might have severed in their defence, and ought to have done so, if either had no confidence in the other; that by agreeing to defend the suit jointly, each had a right to direct such locations, as he thought would contribute to their mutual defence. That this suit, however,

was not for money paid by the plaintiff for locations made by himself, but for costs incurred by the plaintiff in ejectment in making his locations, and in otherwise prosecuting his suit for which a judgment had been rendered jointly against the present plaintiff and defendant. The plaintiff in ejectment might perhaps have insisted, at the trial, upon the agreement with the present defendant, and might not have made other locations than those contained on the old plots, but this he did not chuse to do. He went on to make entire new plots, for the expense of which he recovered his judgment, and the present defendant is liable for his moiety to the present plaintiff, unless he can show himself entitled to other credits than those contended for by reason of the new plots. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

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The case was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J. by

*Winder*, for the Appellant, (who cited 2 *Com. on Contr.* 151.) and by

*Key*, for the Appellee.

THE COURT concurred with the court below in the opinion given in the bill of exceptions.

BUCHANAN, J. In this case I differ in opinion with the rest of the court. [He here stated the facts.]

The question is, whether the plaintiff can, in an action for money paid, &c. recover from *S. Norwood* one half of so much of the costs adjudged against them in the action of ejectment as might have been saved under the agreement.

The action of *assumpsit* is an equitable action, and in order to support it the law will often raise an implied promise according to the circumstances of the case. But there must always be either an express or implied undertaking. In this case there is neither, on the contrary all the equity is with the appellant. The costs of making out new plots, so far as they contain the same locations which were made on the old ones, and of the attendance of witnesses whose depositions had before been taken, were incurred by the plaintiff in the ejectment, in consequence of *E. Norwood's* refusal to accede to the agreement. But it is said, that the judgment in the action of ejectment was joint, and

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that each of the defendants in that suit was bound for the whole of the costs adjudged to the plaintiff, which the appellant might have avoided by severing in his defence. But I cannot perceive how his not having severed, in any manner affects the case; for defendants may sever in their defence in other actions of tort, and yet if a joint judgment for damages is rendered against two in an action of trespass or trover, &c. and one pays the whole, he cannot recover against the other a moiety of the money so paid. Nor can one security, who is compelled to pay the whole of the money, in all cases resort to his co-security for a contribution; as if one becomes a joint security at the instance of another, though he is thereby made liable to the person to whom the security is given, yet he cannot be called upon by the other, because it was at his instance that he became a security. And this is a stronger case, with more equity on the side of the appellant; for the costs, which are the subject of controversy, were not only incurred at the instance of the appellee, but against the consent of the appellant; and the law therefore will not raise against him an implied undertaking to pay, and the judgment being joint makes no difference, and cannot shut out any equitable defence which the party might otherwise have had.

JUDGMENT AFFIRMED.

JUNE.

MARYLAND INSURANCE COMPANY VS. GRAHAM.

In an action of covenant on a policy of insurance, stating that H and W Y for account of T G (the plaintiff) did make insurance, and cause themselves, and their and every of them, to be insured, &c. and the assurers, (being a corporate body) executed the policy under their common seal. The declaration stated that the plaintiff, according to the usage & custom of merchants, (through and by H & W Y his attorneys and agents) in his own name, did make insurance &c. Held that the action was well brought.

APPEAL from Baltimore County Court. Covenant by the appellee against the appellants. The declaration stated, "That whereas by a certain deed made between *Thomas Graham* of the one part, and *The Maryland Insurance Company* of the other part, at *Baltimore* county, on the twenty-fourth day of September, in the year one thousand eight hundred and two, which deed, sealed with the seal of *The Maryland Insurance Company* aforesaid, the said *Graham* here into court brings, the date whereof is on the day and year aforesaid, the said *Graham*, according to the usage and custom of merchants, (through and by *Hugh Young* and *William Young*, merchants, trading in partnership under the name and firm of *Hugh and William Young*, his attorneys and

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agents,) in his own name, did make insurance, and cause himself to be insured against all risks, lost or not lost, at and from *New Geneva* to *The Natches*, with liberty to touch at *Charleston* on the *Ohio*," &c. (in the words of the policy.) "And it was also further agreed by the said deed, that in case of any loss or misfortune, it should be lawful for the said *Graham*, the assured, his factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery, of the said goods and merchandizes, or any part thereof, without prejudice to the said insurance, to the charges whereof *The Maryland Insurance Company* aforesaid, by the said deed, did covenant and agree to contribute, according to the rate and quantity of the sum therein insured; and so *The Maryland Insurance Company* aforesaid were content, and by the said deed did bind themselves to the said *Graham* for the true performance of the covenants in the said premises, confessing themselves paid the consideration due to them for the said assurance, by the said *Graham*, after the rate of five per centum on the cargo of the said boat called *The New Geneva*, so by them insured against all risks. And it was also covenanted and agreed, by the said deed, between *The Maryland Insurance Company* aforesaid, and the said *Graham*, that the said *Graham* should abate two per centum to *The Maryland Insurance Company*, in case of the loss of the said cargo in the said voyage, and that such loss should be paid by *The Maryland Insurance Company*, to the said *Graham*, in ninety days after the proof and adjustment thereof, the amount of the note given for the said premium of insurance, if unpaid, being first deducted. And it was also further covenanted and agreed by the said deed, mutually between the said parties, that if any disputes should arise relating to a loss on the said policy of insurance, the same should be referred to two persons, one to be chosen by the said *Graham*, the assured, the other by *The Maryland Insurance Company* aforesaid, which said two persons should have power to adjust the same; and if they should differ, to choose a third, any two of whom agreeing, their determination should be obligatory on both parties. In witness whereof *The Maryland Insurance Company* aforesaid did, by the president thereof, subscribe the sum of sixteen thousand two hundred and sixteen dollars current money, thereby assured, and cause the common seal of the said

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company to be affixed to the said premises, in *Baltimore*, to wit, at the county aforesaid, on the day and year aforesaid, as by reference to the said deed will fully appear. And although he the said *Graham* hath well and duly performed, fulfilled and kept, all and singular the covenants," &c. "contained in the said deed or policy of assurance, on his part to be performed," &c. "and hath fully paid and satisfied *The Maryland Insurance Company* aforesaid, a large sum of money, to wit, the sum of eight hundred and twelve dollars and five cents current money, as a premium and reward for the assurance of the above mentioned sixteen thousand two hundred and sixteen dollars. The said *Graham* in fact faith, that the said boat or vessel called *The New Geneva*, at the time of making the deed or policy, to wit, on" &c. "at," &c. "was in safety, and that divers goods," &c. "of a large value, to wit, of the value of," &c. "were then and there shipped by the said *Graham* in and on board of the said boat or vessel, to be carried therein from" &c. "to," &c. "upon the voyage in the said writing or policy of assurance mentioned, whereof *The Maryland Insurance Company* aforesaid, to wit, at," &c. "had notice; and being so in safety afterwards, that is to say, on," &c. "departed and sailed," &c. (in the usual manner stating the loss of the vessel, of which the company had notice.) "And the said *Graham* then and there requested *The Maryland Insurance Company* aforesaid, to pay him the said *Graham* the said sum of money insured by them as aforesaid, which *The Maryland Insurance Company* aforesaid ought to have paid to the said *Graham*, according to the form and effect of the covenant contained in the said deed or policy of assurance; yet *The Maryland Insurance Company* aforesaid, not regarding their said promises," &c. "have not paid to the said *Graham* the sum of money assured," &c. concluding in the usual manner of such declarations. The policy of insurance was in the usual manner, stating, that "whereas *Hugh and William Young*, for account of *Thomas Graham*, do make insurance, and cause themselves, and their and every of them, to be insured, lost or not lost, at and from *New Geneva* to the *Natches*, with liberty to touch at *Charleston* on the *Ohio*," &c. "and in case of any loss or misfortunes, it shall be lawful to and for the assured, their factors, servants and assigns, (and the assured on their part agree and engage by themselves, their factors, ser-

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wants or assigns,) to sue, labour and travel, for, in and about the defence, safeguard and recovery of the said goods or merchandizes, or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute according to the rate and quantity of the sum herein insured; and so we the assurers are contented, and do hereby bind *The Maryland Insurance Company* to the assured, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for the assurance by the said assured, or their assigns, after the rate of five per cent. on cargo by said boat insured against all risks. And in case of loss, the assured is to abate two per cent. and such loss to be paid in ninety days after proof and adjustment thereof, the amount of the note given for the premium, unpaid, being first deducted. And it is mutually agreed, that if any disputes shall arise relating to a loss on this policy, it shall be referred to two persons, one to be chosen by the assured, the other by *The Maryland Insurance Company*, which two persons shall have power to adjust the same; but in case they cannot agree, then those two persons shall choose a third, and any two of them agreeing, their determination shall be obligatory on both parties. In witness whereof *The Maryland Insurance Company* have, by the president, subscribed the sum insured, and caused their common seal to be annexed to these presents in *Baltimore*, the twenty-fourth day of September one thousand eight hundred and two." The general issue was pleaded. Verdict and judgment for the plaintiff; from which the defendants appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Martin*, for the Appellants. This action is founded upon a policy of insurance executed by an *incorporated company*, under their common seal, which therefore is considered a *specialty*, and the action must be covenant or debt. No person can sue upon the policy but he who can be considered a *party to the specialty*. The policy cannot, as to the assurers, be considered a *specialty*, and as to the assured a simple contract. An agent cannot seal an instrument for another, so as to be obligatory. This

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principle is established in *Burnett vs. Kensington*, 7 T. R. 207. *Hugh and William Young* alone can bring the action, and be considered parties to the specialty, *Godin vs. The London Assurance Company*, 1 Burr. 489, was covenant on a policy executed by *The London Assurance Company*. *Godin, & Co.* brought the action in their own names, yet they were only the agents who made the insurance for the use of *Uthloff*. In 7 *Wentw.* 38, is a declaration against *The London Assurance Company* by *Jacob Mendes Da Costa*, yet he was only the agent who effected the insurance for *Solomon Israel*. No person can declare upon a policy under seal, but he, who in consideration of law, is party to the specialty. The agents in these kind of policies do declare upon them in their own names; therefore, he for whose use the insurance is effected, is not considered a party to the policy so as to declare in his own name. The case of *De Ghetoff vs. London Assurance Company*, 3 *Brown's P. C.* 525, also establishes the principle, that a suit at law must be in the name of the party who effected the insurance. A charter party executed by the master, though said to be done on behalf of the owners, doth not furnish a direct action grounded upon the instrument itself against them. *Abbott*, 146, (122.) But the owners must be made responsible by a special action on the case, or by a suit in equity. *Abbott*, 88, (80.) The rule of the law of *England* is, that the force and effect which that law gives to a deed under seal, cannot exist unless executed by the party himself, or by some one in his presence and by his direction; or in his absence by an agent authorised by another deed. And in all these cases the deed must be made "in the name of the principal," and not by the agent in his name, for the use of his principal. *Abbott*, 146, (122, 123.) If an obligation be made to *J D* to the use of *J S*, it is a good obligation to *J S* in equity, but he cannot sue at law. The suit must be in the name of *J D*. *Shep. Touch.* 369.

In this case the declaration is not supported by the policy. The declaration states, that "the said *Graham*, according to the usage and custom of merchants, (through and by *Hugh and William Young* his attorneys and agents,) in his own name, did make insurance, and cause himself to be insured." The policy declares, "that *Hugh and William Young*, for account of *Thomas Graham*, do make in-

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insurance, and cause *themselves*, and them, and each of them, to be insured." The *declaration* says, "It was further agreed by said deed, that in case of loss, &c. it should be lawful for the said *Graham*, *his factors, servants and assigns, to sue*," &c. The *policy* says, "in case of loss, &c. it shall be lawful to and for the assured, (to wit, *Hugh and William Young*,) and *their factors*," &c. The *declaration* says, "and so *The Maryland Insurance Company* aforesaid did bind themselves to the said *Graham* for the true performance," &c. The *policy* says, "do bind themselves to the *assured*, (the said *Hugh and William*,) *their executors*," &c. The *declaration* says, "confessing themselves paid the consideration due to them for the said insurance by the said *Graham*." The *policy* says, "by the said *assured*, (the said *Hugh and William*,) or *their assigns*." The *declaration* says, "and it was agreed by the said deed *between* the said *Graham* and *The Maryland Insurance Company* aforesaid, that in case of loss the said *Graham* should abate two per cent. to *The Maryland Insurance Company* aforesaid, and that such loss should be paid by *The Maryland Insurance Company* aforesaid, to the said *Graham*, in ninety days," &c. The *policy* has only these words, "and in case of loss the assured, (*Hugh and William*,) is to abate two per cent. and such loss to be paid in ninety days," &c. The *declaration* says, in case of disputes they are "to be referred to two persons, one to be chosen by the said *Graham*," &c. The *policy* only says, "one to be chosen by *the assured*," to wit, *Hugh and William Young*. Thus the court will perceive, that the declaration is, as if the insurance had been effected by *Graham* in his own name, but through his attorneys. Whereas the policy is entered into by *Hugh and William Young* in their own names, though for the use of *Graham*; and hence comes within the decisions referred to in *Abbott and Shepherd's Touchstone*, that though *Graham* has an equitable interest in the policy, yet the suit upon the policy must be in the name of *Hugh and William Young*. That the suit at law must be brought in the name of him who has the legal title, whoever may be interested, is so clear, that it would be superfluous to cite authorities to prove it. The court are however referred to one of a very recent date, and of high respectability, *Lewis vs. Harwood*, 6 *Cranch*, 82. In that case *Wheteroft* assigned a bond given to him by *Lewis*, to *T. & B. Harwood*, who instituted a suit

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thereon in the Circuit Court of the *U. S.* for the district of *Virginia*, against *Lewis*, in their own names. A trial was had, and a judgment given in their favour. *Lewis* brought the case, by writ of error, before the Supreme Court of the *U. S.* where the judgment was reversed, because, though the defendants in error were indisputably justly entitled to the money, yet the suit was brought in a wrong name.

*W. Dorsey*, for the Appellee. It is conceded that the only remedy on the policy is debt or covenant. The latter remedy has been resorted to; and the only question is, whether this action can be sustained in the name of *Graham*? In 3 *Wentw.* 378, there is a declaration in the name of the assured on a similar policy. The case of *Godin vs. The London Assurance Company*, cannot affect the present case. There the insurance was effected by *Godin, Guion, & Co.* and was made as well in their own names, as for and in the name and names of all and every person or persons to whom the same doth, may, or shall appertain, in all or in part; and *Godin, Guion, & Co.* endorsed on the policy, that the insurance was made by the order of *Uthoff*. In that case no objection was made to the right of the plaintiff to sue, but the only question was, whether the person, for whose benefit the policy was effected, had an insurable interest in the thing insured. Besides, the person for whose benefit the insurance was made, was not mentioned in the policy. *Abbott*, 123, (147,) reports a case which unquestionably shows the present action may be maintained. "If a charter party is expressed to be made between parties, but runs thus—This charter party witnesseth, that C, master of the ship W, with the consent of A and B the owners thereof, lets the ship to freight to E and F, and the instrument contains covenants by E and F, to and with A and B; in this case A and B may bring an action upon the covenants expressed to be made with them." In the case before the court the policy of insurance is not expressed to be made between *The Maryland Insurance Company* of the one part, and *Hugh and William Young* of the other; but in these words: *This policy of insurance witnesseth, that Hugh and William Young, for account of Thomas Graham, do make insurance; and the covenants contained in the deed are between The Maryland Insurance Company and the assured, to wit, Thomas Graham, and*

this suit is founded on the covenants made by the company to and with the assured. The case cited from *Shepherd's Touchstone* does not apply, because there was no covenant between the obligor and the *cestui que use*. It is difficult to conceive how the case of *Burnett vs. Kensington*, 7 T. R. 207, can be brought to bear on the present case, as this suit is founded on a deed executed by *The Maryland Insurance Company* by their corporate seal.

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In answer to the objections urged on the ground of the supposed variances between the declaration and the policy, it is sufficient to observe, that the instrument is declared on according to its legal effect.

In *De Ghetoff vs. London Assurance Company*, 3 Brown's P. C. 525, the policy was effected in the name of *De Coninck*, and the names of the assured did not appear on the face of the policy. And it was held that *De Cortinck*, the trustee, might bring an action of covenant on the policy. If the names of the parties assured had appeared on the instrument, then the assured might have sustained an action in their own names, according to the principles established in the case cited from *Abbott*.

It has been the uniform practice in this state to institute suits in this way, and the objection has never before been suggested. In a case decided by the supreme court of the U. S. at the last term, a similar declaration was sustained. *Bigelow and Proud* effected a policy similar to the present one, for and on account of *Jacques Ruden*, with *The Maryland Insurance Company*. An action was brought in the circuit court of the U. S. held at *Baltimore*, on the policy, in the name of the assured against the company, and the plaintiff obtained a verdict and judgment. The cause was removed to the supreme court of the U. S. on bills of exceptions, and the judgment below affirmed. *Maryland Insurance Company vs. Ruden*, 6 Cranch, 338. The case of *M'Donough vs. Templeman*, 1 Harr. & Johns. 156, supports the present action. In that case *Burrows* executed the agreement for and on account of *M'Donough*, and the declaration was in covenant in the name of *M'Donough*, and was sustained; but the court held, that *The George Town Bridge Company*, and not *Templeman*, ought to have been sued, as he executed the agreement as their agent.

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The plots in an action of ejectment are a part of the record, and one of the original plots, or a copy, ought to be annexed to a transcript of the proceedings to make it evidence. A copy of the proceedings in such an action, wherein the verdict and judgment were for land as located on the plots returned in the cause, having no plot or a copy annexed thereto, was held to be a part only of the record, and not to be sufficient evidence, though otherwise properly authenticated.

ORNDORFF VS. MUMMA.

APPEAL from *Washington County Court*. This was a special action on the case, the declaration stating that a suit had been brought in the late general court against the appellee, to recover land of which the appellant was in possession, and that the appellant agreed to indemnify him if he would defend the suit, &c. The general issue was pleaded; and at the trial the plaintiff, (the now appellee,) offered in evidence a record duly certified, &c. of the proceedings in the suit above referred to, being an action of ejectment brought in the late general court, in the name of *George Painther's* lessee against the present appellee, to recover the possession of a tract of land called *The Resurvey on Stoney Glade*, and a tract of land called *The Resurvey on Hills and Dales and The Vineyard*. In which action defence was taken on warrant, and plots were returned. At the trial a verdict was given, and judgment was rendered in favour of the plaintiff in the action for an undivided moiety of the tract called *The Resurvey on Hills and Dales and The Vineyard*, as located by the plaintiff on the plots returned in the cause, and which was included within a deed from *Chapline to Painther*, dated, &c. as located by the plaintiff on the said plots, and which land, so included in that deed, was delineated on the said plots as beginning at, &c. and as to the residue of the trespass and ejectment in the residue of the land and tenements in the declaration complained of, verdict that the defendant in that action was not guilty, &c. There was not annexed to the record of the proceedings above offered in evidence, either of the original plots, or a copy of either. The defendant objected to the record being received in evidence. But the county court, (*Clagett and Shriver, A. J.*) overruled the objection. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. GANTT, and EARLE, J. by

*Brooke*, for the Appellant; and by  
*Hughes and Lawrence*, for the Appellee.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that the plot is a part of the records, and that a copy of it ought to have been annexed to the

transcript. And part of the record only being produced, was not sufficient evidence to support the action in this case.

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JUDGMENT REVERSED, AND PROCEEDENDO AWARDED.

PATTERSON VS. MARYLAND INSURANCE COMPANY.

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APPEAL from *Baltimore* County Court. An action on the case was brought by the appellant, (the assured,) against the appellees, (the assurers,) on a *policy of insurance*, dated the 23d of October 1795, whereby the assured caused himself to be insured, lost or not lost, at and from *Baltimore* to the coast of *Africa*, with liberty of trading on the said coast, and at and from thence back to *Baltimore* again, upon the body, tackle, apparel, and other furniture of the schooner called *The Industry*. The declaration contained four counts—The *first* on a *Barratry* by the master and marines, whereby the vessel was wholly lost to the assured. The *second* on a *Barratry* by the master on the 1st January 1796, &c. The *third* for a capture by *pirates*, &c. The *fourth* for a capture by persons unknown, &c. Plea, the general issue. At the trial the plaintiff, (now appellant,) read in evidence to the jury the policy of insurance, dated the 23d of October 1795. He also gave in evidence, that at the time of making the policy, he was and still is a citizen of the *United States*, and then was the sole owner of the schooner *The Industry*, mentioned in the policy, an *American* vessel, regularly documented as such; and that the said schooner sailed from the port of *Baltimore* in good safety, on the voyage mentioned and described in the policy, on or about the 23d of October 1795, with *Nathaniel A. Ogden* on board as master, and *Thomas Buckner* as mate, for the said voyage, and a certain *Charles Leonard Le Baron* as supercargo for the said voyage. That on the 23d of May 1796, the schooner *The Industry* returned to *Baltimore*, and was reported and entered at the custom-house there, by the plaintiff, as coming from *Saint Bartholomew's* in the *West Indies*. That the said master, mate and supercargo, arrived in the said schooner at the port of *Baltimore*, together with one *Henry*

A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can, from the nature of the case, be had.

In an action on a policy of insurance, in order to prove the several matters alleged in the declaration, the plaintiff offered to read in evidence a protest made by the captain, &c. others, of the vessel, on her return, before a notary public in *Baltimore*—Held, that the protest was merely a voluntary affidavit, and a notary public, except in those cases where a protest by *lex mercatoria*, or by statute, is authorized, has no authority to take a protest.

The point of view in which the authority of a notary public is to be considered generally, relates to those commercial transactions occurring in one country which are to be proved in another, or in which strangers are interested, and the office derives its existence from the courtesy of one nation to another. And where he is to do certain acts by statute, the authority is limited to its designated object.

The protest of the captain is not the best evidence the nature of the transaction admits of. It is not to be considered as objectionable as if used as positive proof; for it would throw the *onus probandi* on the opposite party.

deposition *de bene esse*; and it cannot be used as *prima facie* evidence only, which is equally as objectionable as if used as positive proof; for it would throw the *onus probandi* on the opposite party.

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*Hains* and *John Mannel*, who left the port of *Baltimore* in the said vessel, as seamen, and returned in her as such, and who were the only seamen who sailed in the said schooner on the said voyage, and returned in her as aforesaid. He also gave in evidence, that *Ogden* and *Buckner* have been dead about two years, and that *Hains* and *Mannel* went from the port of *Baltimore* in the month of November in the year 1796, to the eastern shore of this state, and cannot now be found or heard of in the port of *Baltimore*. But offered no evidence to prove that the said mariners and supercargo were dead, or that any summons issued for them to testify in this cause, or that any steps have been taken by the plaintiff, previous to the empanneling of the jury in this cause, to ascertain their present residence, or to procure the benefit of their testimony. He also gave in evidence, that on the 23d of May 1796, and until on and after the 26th day of the same month, *Thomas Donaldson* was a notary public, residing in the port of *Baltimore*, and duly authorised and commissioned. He also offered in evidence, that it is, and for more than twenty years last past, has been the usage and custom of merchants, insurers, and others dealing in and making insurance in the port of *Baltimore*, in cases where they have adjusted their losses without suit, to receive the protests of the captures of vessels insured, as evidence of the matters therein stated, when losses are claimed, and for insurers, when called on for payment of such losses, to require the said protests to be produced, or their nonproduction to be accounted for by the claimants, before such losses are adjusted or paid, and not to call in question the truth of the facts stated in such protests, unless some strong ground of suspicion should appear. He also gave in evidence, that it is usual in *Baltimore* for the captains of vessels arriving from other ports, to note their protests with a notary within twenty-four hours after their arrival respectively, which noting is done by informing the notary of the principal matters intended to be contained in such protests respectively, and intended to be thereby protested against. But that it is not deemed essential that such noting should be done within twenty-four hours as aforesaid, or within any other particular time, and that protests are never objected to by insurers, or others, for not being noted within twenty-four hours, or any other particular time, provided the said pro-

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tests be noted or made within a reasonable time after arrival. And thereupon the plaintiff, to prove the several matters contained in his declaration in this cause alleged, produced a *protest* made in the port of *Baltimore* on the 26th of *May* 1796, by *Ogden, Buckner, Hains* and *Mammel*, by *Thomas Donaldson* before mentioned, and by him duly certified under his notarial seal, and recorded in his office, and offered to read the said protest to the jury, for the purposes aforesaid, as the protest of the said master and mate. He also, for the purposes aforesaid, produced a *protest* made in the island of *Saint Bartholomew's*, in the *West Indies*, on the 26th day of *March* 1796, by *Ogden, Buckner, Hains*, and one *John Cockeny*, then a seaman on board of the schooner, before a notary public there, and duly certified by him under his notarial seal, and offered to read the last mentioned protest in evidence, for the purposes as aforesaid, as the protest of the master and mate. The defendants offered in evidence, that *Ogden* and *Buckner*, from the time of their arrival at the port of *Baltimore*, resided there for several years, and that the defendants had no knowledge of the protest of the 26th of *May* 1796, or of the matters therein contained, until and after the institution of this suit, and that the plaintiff, from the making of the policy of insurance, until the present day, hath constantly resided at *Baltimore*. The defendants objected to the reading of the protest of the 26th of *May* 1796, to the jury. And the court, (*Nicholson*, Ch. J. and *Hollingsworth*, A. J) sustained the objection. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at the last term before CHASE, Ch. J. GANTT, and EARLE, J.

*Martin* and *Harper*, for the Appellant, contended, that as the master and mate were both dead, the protests made by them, and the seamen, ought to have been received in evidence upon common law principles, as the seamen were transient characters, and it was not known where they were to be found. They cited *Peake's Evid.* 14, 15; and *Bryden vs. Taylor*, 2 *Harr. & Johns.* 396.

*W. Dorsey*, for the Appellees. The protest of a captain can only be read in evidence to invalidate his testimony;

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it is not evidence *per se*. He cited *Peake's Evid.* 74. *Senat vs. Porter*, 5 T. R. 158. *Christian vs. Coombe*, 2 Esp. Rep. 489. *Ritchette vs. Stewart*, 1 Dall. Rep. 317. *Boyce vs. Moore*, 2 Dall Rep. 196; and *Walsh vs. Gilmor*, (on appeal in this court.)

*Curia adv. vult.*

At the present term the opinion of the court was delivered by

EARLE, J. A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can, from the nature of the case, be had.

The protest of the captain was merely a voluntary affidavit, and a notary public, except in those cases where a protest by the *lex mercatoria*, as in cases of foreign bills, or by statute, as the act of 1785, ch. 58, statute 9 & 10 William III, ch. 17, 3 & 4 Ann, ch. 9, in case of damages on inland bills and notes, has no authority to take a protest. The point of view in which the authority of this officer is to be considered *generally*, relates to those commercial transactions occurring in one country which are to be proved in another, or in which foreigners are interested; and the office derives its existence from the courtesy of one nation to another; and where he is to do certain acts by statute, the authority is limited to its designated object.

At common law, the best evidence must be had the nature of the transaction admits of. This claim is founded on a loss at sea, in a trading voyage. The captain's protest, before a notary, is produced as evidence of the loss, and the transaction is of late occurrence. Part of the crew are stated to have been residents of the eastern shore, to have returned in the vessel, and to have remained for some time after in *Baltimore*. Those persons were not searched for, and it does not appear that they had left the state, and could not be found. Therefore, as those persons cannot be presumed to be out of the reach of the process of the court, the plaintiff should have produced them, for they must be supposed to be equally cognizant of facts happening on board the vessel on her voyage.

Besides, a party is entitled to cross examine a witness, and it is a general rule, that without giving him an opportunity to do so, his deposition shall not be evidence. In this

case there was no opportunity, and on that ground the protest was incompetent. It is true that in some few cases similar protests have been read in evidence, but it has been to impeach the testimony of the protesters, and not to dispense with their parol testimony, or that of others, or of other proof.

This protest is not to be considered as a deposition *de bene esse*. It differs in two essential particulars; for first, depositions *de bene esse* are taken by some court, or by an express authority derived therefrom, or under our acts of assembly to perpetuate evidence; and secondly, they are always taken upon notice given to the adverse party, if practicable.

By the law of merchants, the captain must protest, on arriving at a port, against damages happening in a voyage thereto, but such protest is not evidence to charge the underwriters upon their policy. It is to protect the captain from his liability, and in such cases some others of the crew must join in the protest; and the reason is, that the captain may thus perpetuate that evidence which may be necessary to exonerate him from personal responsibility, as the crew, being persons of no fixed residence, and liable to more than ordinary casualties, their testimony is therefore more necessary to be taken, and is more liable to be lost.

As to using this protest as *prima facie* evidence only, it is equally as objectionable as if used as positive proof. For the purpose for which it was produced in this case, as in all others, throws the *onus probandi* upon the adverse person, and therefore, if allowed as evidence on that score, it established the cause of action unless contradicted. For *prima facie* evidence is sufficient, if not destroyed by other proof, as a note is *prima facie* evidence of a consideration, and throws the *onus probandi* on the opposite party.

The court affirm the judgment of the court below, with costs to the appellees.

CHASE, Ch. J. dissenting from the opinion of the court delivered the following opinion: The copy of a protest is not evidence *per se*; but under certain limitations and restrictions is admissible. It is evidence, if the captain, and those who signed it, and whose depositions are offered to be read, are dead, or out of the reach of the process of the

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court. It is evidence to impeach the credit of the captain, and those who have signed it, when examined in relation to the facts and circumstances detailed in it, without laying any foundation for introducing it, in the same manner that a deposition is evidence to impeach the credit of a witness when examined in court, by showing he is inconsistent, or has contradicted himself. The credit, the protest is entitled to, must be determined by the jury under all circumstances and the evidence in the case.

A deposition legally taken is not evidence *per se*, and cannot be admitted without showing the death of the deponent, or his not being amenable to the process of the court. This case is not distinguishable on principle from the ordinary case of receiving depositions in evidence; for the protest is taken by a public officer authorised to take it, and whose office and authority are recognized by the courtesy of nations.

The usage of trade and general utility, from necessity, require the admission of this kind of testimony, subject to the restrictions already mentioned.

It would be to little purpose to allow of protests, in commercial transactions, to be made on oath before a notary public, and to be by him recorded, if copies of such protests cannot legally be received as evidence in those cases in which the persons who made the protests are dead, or not amenable to the process of the court.

Although the evidence of seafaring persons, and others, may be perpetuated in the manner the acts of assembly have prescribed, those provisions do not exclude this kind of testimony, but must be considered as supplying additional means of proof.

The office of notary is an office of public notoriety; and acting under the solemnity of an oath, his acts are recognized by the courtesy of nations, and considered as records, with the view of furnishing evidence in those cases to which his acts refer.

In this case it is admitted by the counsel, that the protest was made in convenient time, and it appears to have been made at the proper place—the port of destination, and where the parties concerned in interest resided at the time.

It is proved in the case, that the captain and mate, whose testimony was objected to, were dead at the time.

This kind of proof is not conclusive, but is *prima facie* evidence, and may be counteracted and repelled by other testimony; and as the credit of it must be determined by the jury, I cannot see any inconveniencies attending the admission of it, equal to those which will result from its rejection. I think it is the safest way to allow it to go to the jury; and therefore am of opinion that the judgment of the court below ought to be reversed.

JUDGMENT AFFIRMED.

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APPEAL from a decree of the Court of Chancery. The petition of the appellee against the appellants, filed on the 12th of June 1804, stated, that on the 8th of October 1796, the appellants filed a bill against him, he being then an infant, for the conveyance of part of a tract of land called *Paraphrase* and *The Resurvey on John's Delight*, containing 166 acres, lying in *Frederick* county. That a commission issued to appoint a guardian, and take his answer, on the 19th of November 1796. That *Henry Kuhn* was appointed his guardian, who answered and admitted all the facts contained in the bill. That no evidence was taken to establish the truth of the allegations contained in the bill, and that they cannot be established; and that the decree was unduly and improperly obtained. That the petitioner came of age the 13th of May 1804. Prayer for a revision and reconsideration of the decree, and for general relief. The defendants, (now appellants,) by their answer, admitted the filing of their bill, the appointment of a guardian, and the answer and decree, but averred that the facts stated in the bill were true and could be established, and that the decree was fairly and properly obtained, and they pleaded the decree and proceedings in bar of the relief prayed by the petition.

The proceedings on the bill referred to, with the decree for a conveyance, &c. passed the 2d of March 1797, were exhibited, and testimony was taken under commissions issued for that purpose.

KILTY, Chancellor, (February 1807.) This case, which was argued at the present term by the counsel for the com-

ceeded a reconveyance of land, which, by a former decree that court had directed to be conveyed,

Where a bill had been filed in chancery against an infant for a specific performance of a parol agreement entered into by the ancestor, to convey land to his daughter, and on the answer of his guardian, and his agreement, a conveyance was decreed. On the arrival at age of the infant, he petitioned under the act of November 1773, ch. 7, for a reconveyance.—*Held*, that in order to show cause why a revision and reconsideration of the decree should take place, the party, who was an infant, may examine the proofs for the decree, and resort to any error on its face, tending to show that the conveyance decreed ought not to have been directed; and also that such decree and the proceedings therein, could not be pleaded in bar of the relief prayed. The petitioner is not confined to the former proceedings only, but may by further proceedings show himself entitled to relief.

An infant is not bound by the answer of his guardian if he shows his dissent to it within the proper time.

Where in such a case, the court of chancery de-

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plainant and the defendants, arises under the act of November 1773, *ch. 7*, for the amendment of the law, being a petition for the reconveyance of land, which it appears was on the second of March 1797, decreed to be conveyed in a suit in which the present defendants were complainants, and the petitioner, then an infant, the defendant. The petition is not in form exactly according to the act, or to the proviso in the decree, and the decree itself is only incidentally mentioned, and is not made a part of the petition. But this defect is supplied by the answer in which the decree is referred to, and the petition may be considered as an application, to be permitted to show cause why the said conveyance ought not to have been ordered or directed. The chancellor is not apprised of any decision, or former suit, under this act, and he must therefore be left to form his own opinion as to the construction of it, on which the counsel very widely differ. His opinion is, that in order to show cause, the party who was an infant may, under this act, examine the proofs for the said decree, and resort to any error on the face of the decree, tending to show that the conveyance therein decreed ought not to have been ordered or directed, and therefore that the decree and proceedings therein cannot be pleaded in bar of the present relief prayed, as is contended by the plea put in with the answer of the defendants. Such a plea would entirely frustrate the intent and object of the act, and would be, as is expressed in the case of *Fountain vs. Caine and Jeffs*, (1 *P. Wms.* 504), at the same time that the court gave him liberty to show cause, to tie up his hands from showing cause. In a case where such a plea was allowed, (*Gregory vs Molesworth, & Atkins*, 626,) the bill had been brought by an infant, by his *prochein amy*, and of course the complainant could not have the benefit of a proviso similar to the one in the present decree; and in *Napier vs. Effingham*, (2 *P. Wms.* 401,) an infant complainant was allowed to show cause after he came of age.

The chancellor considers also, that the petitioner is not confined to the former proceedings only, but may, by further proceedings, show himself entitled to relief. This however is not a very material inquiry at present, as the parties have consented to the admission of the testimony exhibited in the first suit, and a commission has issued in this case.

If upon this testimony the chancellor was satisfied that the contract of *Henry Pitesell*, the father, with his daughter *Elizabeth*, was sufficiently established to entitle her to a decree for a specific performance, it would be unnecessary to go into the inquiry as to the error of the decree against the petitioner, in order to determine whether such decree ought to have been directed. But his view of the result of the testimony being different, the inquiry, however unpleasant, must be made. Though it may be remarked, that his predecessor, if the present case had come before him, would have been bound to examine into his decree, and to determine accordingly, if any error was found in it, and so also in cases of bills of review.

On the established principles of equity, an infant cannot be bound by the answer of his guardian, if he shows his dissent to it within the proper time, although such answer will be evidence against him, if at such time he neither amends nor makes a new answer, which he may do. Lord *Hardwicke*, in the case of *Bennett vs. Lee*, (2 *Atk.* 531.) remarked, that the infant was justified in saying that his guardian had mistaken his case entirely, and that the court could not refuse his putting in a better answer, and making the best defence he could.

The petition in this case must be considered as tantamount to making a better answer than that of the guardian, and a better defence to the former suit; and if considered in opposition to the bill, without other evidence, will show, that if such had been the answer, the decree would not have been made, and without further evidence cannot be supported. If the petitioner (setting aside the present evidence,) is entitled to relief from the decree having been made on the answer, to which he now dissents, his claim will be strengthened by attending to the manner in which the answer was put in, independent of the interest, alleged to be proved under the commission, which the chancellor is willing to put out of the case, as to the guardian.

The bill filed in October 1796, charges that *Henry Pitesell* expressly, in consideration of the services rendered by *Elizabeth*, his daughter, (and so particularly alleged at the time by him,) and of his natural love and affection for her, and her son, did promise to, and contract with her, to make over and convey in fee simple a parcel of land as therein described, which by the said promise and contract

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was to be conveyed so as to secure a separate estate therein to her for life, with remainder in fee to her son, and wholly to exclude her husband from any advantage from the same.

If an admission had not been made by the answer, this *parol agreement*, so particular as to the terms of the conveyance, would have required strong proof to support it. But the answer roundly admits the whole—the consideration—the contract—the life estate, and the remainder; and also, that the land was accurately described in the plot exhibited by the complainants. Admitting that the guardian believed the facts to be so, it cannot be thought that he had such a knowledge of them as to make it his duty to admit them, and his answers to the interrogatories in the last commission show that he had not. It appears that this answer was signed for the defendant by a solicitor of this court, and it appears further, that an agreement was signed by him, and by the counsel for the complainants, that the chancellor should decree upon the bill and answer, there being no evidence necessary to be taken; and that a decree should pass for the land as prayed; which agreement and answer by the guardian both went beyond the proposition made by the late chancellor in his remarks of November 1795, which was only for a consent to take depositions before a single magistrate. And it will be found, that the *second* section of the act of 1773, *ch. 7*, which renders the consent of the guardian necessary, extends only to lands chargeable with the payment of money or tobacco, and not to agreements to convey. The chancellor, therefore, takes up this case as if a bill was brought before him by the present defendants for a conveyance, on the proceedings and the evidence now produced, not only without the benefit of the admission in the guardian's answer, but as if the equity of the bill was denied by answer as strongly as it must be inferred to be from the present petition. And if in that view he finds that *Prutzman* would be entitled to relief, it will be proper to dismiss the petition; and if otherwise, to decree according to it. The chancellor is disposed to carry agreements into effect in every case in which it can be done consistent with the established principles of courts of equity, and has doubted the propriety of many cases in which, from too great strictness, the aid of the court has been refused; but the present case is at best

a very doubtful one on the evidence. The expressions of *Henry Pitesell* seem to be rather proofs of an intention, than of an agreement. The particular mode of conveyance intended or agreed is not shown by the evidence. The bill states, that the land was to be conveyed so as to secure a separate estate therein to *Elizabeth* for her life, with remainder in fee to her infant son; and the decree was for a conveyance to the son in trust, for the sole use of *Elizabeth* during her life, which, though substantially the same in effect, shows that the agreement relied on was not precise in its terms. The part performance of this parol agreement by giving possession, is not clearly established. The moving his daughter to the land in question, to reside on a part of it, and suffering her to receive the rents, might, from their relationship, have taken place without an agreement to convey; and the father appears, notwithstanding some of his declarations, to have exercised acts of ownership on the land, particularly from the evidence on the last commission; and the improvements relied on are not of a very valuable kind. And on these grounds the chancellor is not satisfied that there was such an agreement to convey as would have bound the father in his lifetime. The consideration of the services of *Elizabeth*, if material as to her, cannot extend to her son. There is also another circumstance against the right of the present defendants, under the decree in the former suit. The first bill (a) stated, that *Henry Pitesell* promised to convey to *Elizabeth*, a parcel of land, being 100 acres of *The Resurvey on Smith's Hap*, which 100 acres were to run up to a road called *Weller's school road*. The second bill stated the land to have been resurveyed, and the part contracted for to have been, (as in the other bill,) in the tenancy of *Daniel Fry*, and to be accurately and particularly described in the courses and plot exhibited. This plot makes the

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(a) There had been a bill filed in the name of *Elizabeth Prutzman*, against the present petitioner, on the 10th of February 1791, the proceedings upon which were exhibited in the present case. The answer of the then guardian of the petitioner did not admit the contract as stated, and a commission issued, and testimony was taken. In November 1795, the then chancellor, by his order, considered that the contract had not been established by the testimony taken, and proposed that the complainant, with the consent of the guardian, should take further testimony before a single magistrate, if she had any, &c. But that if nothing further was done, the bill should be dismissed at the next term. Nothing further appears to have been done.

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contents 166 acres, and it does not appear from what *data* the courses were run, or when or by what authority it was made, or wherefore the number of acres should have been more than 100 as at first claimed, and as proved to be the quantity intended, by the bulk of the testimony, and particularly by that of *Thomas Petty*, who says that *Henry Pitesell* intended the 100 acres to run up the branch to *John Weller's* school road, and he allowed that it would contain 100 acres, and if to said road did not contain 100 acres, then it should go over the road so as to include that number. The exhibit No. 1, could not be considered as evidence, except by the admission in the answer, which has already been remarked, and it is plain from the evidence of *Kuhn*, under the last commission, that he had no actual knowledge of the correctness of this survey. The opinion of the late chancellor upon the effect of the evidence, was given to the counsel in writing; and it may have been owing to that circumstance that they did not procure the testimony of the same, or other witnesses, and also to the opinion taken up and expressed in the submission, that no evidence was necessary. No reasons were assigned in the decree, and it may be presumed that this submission, and the agreement, formed the reasons; but as to the evidence, the reasons are expressed, and should have their due weight in deciding on the same evidence, or on evidence rather lessened than increased by the last commission, and it appears to be just to put the parties in their former situation. From these concurring objections to the decree, sufficient, as the chancellor conceives, to show cause why the said conveyance ought not to have been ordered or directed, the present petitioner is entitled to a decree of this court for a reconveyance of the land so conveyed, and for a full account of the rents and profits thereof. The hardship of the case as to *Elizabeth Prutzman*, or the demerit of the present application, are circumstances which the chancellor cannot suffer to influence his decision against the evidence, and the principles of equity applicable to the case. Such cases have frequently occurred, and the hardship to the persons intended to be benefitted by the ancestor, and the consequent benefit to the heir at law, were the result of the rules of inheritance formerly in force, but now altered by our act of descents. But as to the petitioner, he was entitled to the protec-

tion of the court as an infant, when the decree was passed against him. He was not in a situation to appeal from it, and the present defendants will have it in their power to have the whole proceedings revised by the appellate court. *Decreed*, that *Henry Prutzman*, by a good deed, to be acknowledged and recorded agreeably to law, shall give, &c. unto the petitioner, *Henry Pitesell*, and his heirs, all that parcel of land in *Frederick* county, part of *Paraphrase* and *The Resurvey on John's Delight*, containing 166 acres, together with, &c. which was on the 29th day of March 1797, conveyed by *Henry Kuhn*, as guardian and in behalf of *Henry Pitesell*, to the said *Henry Prutzman*, in trust, as by reference to the same will appear, &c. *Decreed* also, that *John Prutzman*, and *Elizabeth* his wife, shall by a good deed, &c. give, &c. unto the petitioner, *Henry Pitesell*, and his heirs, all their interest and right in the said land. *Decreed* also, that the defendants account with the petitioner for the rents and profits of the land, &c.

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From this decree the defendants appealed to this court.

*Shaff*, for the Appellants, contended, 1. That the decree referred to cannot be set aside by a bill, unless that bill suggests fraud, and that fraud be proved; and 2. That in this case there was no fraud. On the *first point*, he cited the acts of *Nov. 1773, ch. 7, & 1795, ch. 88. Mosely, 506. 1 Harr. Ch. Pr. 251. Fountain vs. Caine & Jeffs, 1 P. Wms. 504; and Napier vs. Effingham, 2 P. Wms. 401.*

*Ridgely*, for the Appellee.

DECREE AFFIRMED.

ORME VS. LODGE.

JUNE.

**ERROR to Montgomery County Court.** An action of slander was brought by the plaintiff in error, to which the defendant in error put in the plea of justification short, under an agreement that it should be considered as if a good and valid plea of justification had been put in at length in a formal and legal manner, and so plead as the law required a legal justification in such a case to be pleaded, and the issue regularly joined thereon. At the trial, the court having refused to direct the jury on the plaintiff's

In an action of slander for words spoken, the plea of justification was put in short, with an agreement of the counsel that it should be considered as if a good and valid plea of justification had been put in at length in a formal and legal manner. The court of appeals, on the record coming before them by a writ of error sued out by the plaintiff the judgment

—*Held*, that the plea was not sufficiently pleaded, and upon that ground, reversed

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prayer; (but which it is not necessary to state here,) he excepted; and the verdict and judgment being against him, he brought the present writ of error.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J. by

*Key*, for the Plaintiff in error; and by  
*Taney*, for the Defendant in error.

CHASE, Ch. J. The plea of justification is not sufficiently pleaded, (being put in short,) and upon that ground the court reverse the judgment.

JUDGMENT REVERSED.

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SHIPLEY VS. ALEXANDER.

In trespass for mesne profits of land recovered in an action of ejectment—*Held*, that the judgment in ejectment was legal and sufficient evidence to support the action, notwithstanding the judgment had been removed to, &c. was depending in the court of appeals, on writ of error prosecuted by the defendant, and bond having been given as required by law; and altho' no writ of possession had ever issued, and the plaintiff had not made any entry into the premises since bringing the ejectment. That the tenant in possession was estopped by his confession of lease, entry and ouster, and could not controvert either the title or possession of the plaintiff; and it was sufficient for the plaintiff to produce the judgment alone, without showing the writ of execution executed, or possession acquired in any other manner.

ERROR to *Anne Arundel* County Court. *Trespass for mesne profits*, brought by the defendant in error against the plaintiff in error, on the 22d of February 1806, for the use and occupation of a tract of land called *Frog Range*, from the 1st of January 1803, until the 21st of February 1806. The general issue was pleaded; and at the trial, the plaintiff in the court below offered and read in evidence a record of proceedings and judgment recovered in the general court at October term 1805, in an action of ejectment, brought in the name of his lessor against the present plaintiff in error, for the recovery of possession of the above mentioned land. The plaintiff then offered evidence of the value of the mesne profits of such land, from the 1st of January 1803 to the 22d of February 1806. It was admitted, on the part of the plaintiff, that the above judgment was rendered on the 10th of November 1805, removed to the court of appeals by the defendant, under and in virtue of a writ of error, and that she gave bond, with sureties, as the law requires, and that the writ of error was still depending in the court of appeals. It was further admitted by the plaintiff, that no writ of possession had ever issued on the judgment, and that he had not made any entry into the premises since the institution of the action of ejectment. The defendant then prayed the court to direct the jury, that the plaintiff was not entitled to recover in this action. But the county court, [*Chase, Ch. J.*]

refused to give the direction, being of opinion that the judgment in the action of ejectment was legal and sufficient evidence to support this action for the mesne profits. The defendant excepted; and the verdict and judgment being against her, she brought the present writ of error.

The cause was argued before BUCHANAN, GANTT, and EARLE, J.

*T. Buchanan*, for the plaintiff in error. The question is, whether or not *mesne profits* can be recovered during the pendency of the action of ejectment in the appellate court, and where the plaintiff is not in possession of the land, for the profits of which the action is brought? No person can support an action of trespass, unless he is in possession. An heir or devisee cannot support trespass before entry—after an entry, the law refers the entry to the time his right accrued. So here; the defendant in error could not support the action, not having obtained possession under his judgment in ejectment; if he had obtained such possession, his entry would have related to the time his title accrued. He cited *Bull. N. P.* 86. 1 *Esp. Dig.* 444. *Aslin vs. Parkin*, 2 *Burr.* 665. *Compere vs. Hicks et al.* 7 *T. R.* 723; and 3 *Blk. Com.* 210.

*Martin*, for the defendant in error. The case of *Aslin vs. Parkin*, 2 *Burr.* 665, was an action for mesne profits brought after judgment by default against the *casual ejector*, in an ejectment, in the name of the lessee of the *nominal plaintiff*, against the *tenant in possession*. It was objected that the action could not be supported without proving *actual entry* in the plaintiff; and as the plaintiff was *nominal*, no actual entry could be proved to have been made by him. The court determined the action to be sustainable, and that it made no difference whether the judgment was on verdict or by default. The case of *Compere vs. Hicks et al.* 7 *T. R.* 723, is that of a fine; and it is a fixed principle of law, that there must be an *actual entry* to avoid a fine, before ejectment or trespass can be brought. Neither of these cases militates even in appearance against the decision of the court below in this case. In 1 *Esp.* 404, we are told that a person cannot maintain an action of trespass before an entry and *actual possession*, though he hath the *freehold in law*. Hence, therefore, the heir cannot bring

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trespass against an *abator* before actual entry. Nor can disseisee against disseisor, except for the *act of disseisin*; but for injuries done *afterwards*, disseisee cannot bring trespass until *actual entry*. 3 *Blk. Com* 210, states the law in the same manner; as also doth *Bull. N. P.* 86. These three last are elementary treatises, and all cite as their authority for what they have stated, 2 *Roll. Ab.* 553, and *Roll.* cites 19 *Henry VI.* 28, b. And as the authority on which it is founded was during the feudal system, so did the doctrine itself depend entirely upon the principles of the feudal system, and the tenures growing out of it. Under that system no person could have a *freehold* in lands without the concurrence of the lord, and without some act done by the lord giving investiture of the freehold to the tenant. "*Sciendum est feudum sine investitura, nullo modo constitui posse.*" 2 *Craig*, Lib. 2, tit. 2. Upon every *descent* or alienation, during times of pure feudal tenure, the lord gave, and therefore he only could change, the *seisin* or *investiture*. 3 *Blk. Com.* 170. Thus, therefore, by the death of the ancestor, the *heir* or *devisee* could not become the *actual tenant of the freehold*, without an act done by the lord, to wit, the giving him *seisin* and *investiture*. And if before this act of the lord, a stranger, who had no right, made entry, and got possession of the freehold, having the *seisin* and *investiture* thereof given to him by the lord, through his connivance, the heir or devisee was obliged to make an actual entry before he could bring trespass; for the *abator* had the *actual freehold* until the entry of the heir or devisee; and no principle can be more clear than that no action of trespass can be supported against the *actual tenant of a freehold*. That the abator obtains possession of the *freehold*, and is the tenant of the freehold, the following authorities prove: "*Abatement* is where a person dies seized of an inheritance, and before the heir or devisee enters, a stranger, who has no right, makes entry and gets possession of the *freehold*." 3 *Blk. Com.* 167. These ousters, (that is abatement and intrusion,) are *oustes from freeholds in law*, which is done by getting themselves substituted to be tenants of the lord, instead of the heir, devisee, remainderman or reversioner. *Ibid* 169, 170. If my father dies seized, and no one enters, there is *seisin in law* in the heir, (not in fact till the lord invests him;) and pre-

*eiſe quod reddat* may be brought againſt him as tenant of the freehold; but if one abates, the *precipe quod reddat* muſt, in that caſe, be againſt the abator, he being tenant of the freehold in fact. *Brook*, tit. *Seiſin*, pl. 13. And as the abator and intruder became actual tenants of the freehold by the abatement or intrusion, ſo did the diſſeiſor by his diſſeiſin. Diſſeiſin is an ouſter from a freehold in deed. 5 *Blk. Com.* 169. Diſſeiſing is diſpoſſeſſing the tenant and ſubſtituting oneſelf to be tenant of the lord. *Ibid.* 171. Every entry is not a diſſeiſin, but there muſt alſo be an ouſter of a freehold. *Co. Litt.* 181, a. Diſſeiſin, therefore, muſt mean ſome way or other of diſpoſſeſſing and turning the tenant out of his tenure, and uſurping his place and feudal relation, &c. *Taylor vs. Horde*, 1 *Burr.* 107. Diſſeiſin was a complicated fact, and differed from diſpoſſeſſing. The freeholder by diſſeiſin differed from a poſſeſſor by wrong. *Ibid.* 108. A diſſeiſin made the diſſeiſor tenant to every demandant, and freeholder *de facto*, in ſpite of the true owner. *Ibid.* 111. And hence, though the diſſeiſee might puniſh the diſſeiſor for the act of diſſeiſin, it being an injury to his freehold, of which he had at that time the actual poſſeſſion, yet the diſſeiſee could not bring actions of treſpaſs againſt the diſſeiſor, for ſubſequent injuries to the property, before he obtained the poſſeſſion of the freehold by entry; becauſe thoſe ſubſequent injuries were acts of a freeholder *de facto*. But when he re-entered on the diſſeiſor, he was by relation conſidered as having ever remained in poſſeſſion of his freehold, and therefore could ſuſtain treſpaſs againſt the diſſeiſor. Theſe remarks explain the paſſages in *Buller*, *Blackſtone* and *Eſpinasse*, which have been cited, and others which may be found in other elementary writers; they relate to ſuch wrongful ousters as gave the wrongdoer a freehold *de facto*, until defeated by entry; and though the conſequences of actual diſſeiſins, (and alſo of actual abatements and intruſions,) conſidered as ſuch in England, as Lord Mansfield in *Taylor vs. Horde*, 1 *Burrows*, 112, informs us, ſtill exiſt; yet ſuch has been long ſince the alterations of tenure, and of alienation of real property, that there cannot be an actual diſſeiſin, abatement or intrusion; for diſſeiſin by election is very different from actual diſſeiſin, and the freeholder, by diſſeiſin, differed from a poſſeſſor by wrong. *Ibid.* 108, 111. As the

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law has long ceased to exist in *England*, under which *actual* abatements, intrusions or disseisins, could take place, so in this state no such law *ever* existed. We therefore cannot be subject to any provisions or consequences which might arise or result from such law. What then is the situation of the citizens of this state? When a person seized of land dies, as there is no act to be done by a lord, or any body else, to give seisin or investiture; and as no person by a tortious entry can, through the consent or connivance of a lord, or any other person, obtain a *freehold de facto*, the consequence follows, of course, that the heir or devisee immediately becomes tenant of the freehold, not only *de jure* but *de facto*. He has not only seisin and possession in law, but in fact; for whoever has the right is considered in law to be in possession according to his title, until there has been a wrongful possession against him for twenty years. So is the law as to alienees of lands under any other mode of alienation. Hence it follows, that no actual entry is requisite to enable an heir or devisee, or any alienee, to punish a wrong doer for injuries done to the real estate, as the law considers them in actual possession according to their title, and as the wrong doer cannot, by his tortious act, acquire to himself a *freehold de facto*. Hence also, whoever has title may *devise*, and may convey by bargain and sale, by lease and release, &c. his lands, and is considered in possession for that purpose, although a wrong doer has entered upon those lands, unless such wrong doer has had adverse possession for twenty years, and so far only as he has had such adverse possession. A citizen of this state may *elect* to consider himself out of possession, for the purpose of bringing an action of ejectment, as in *Great Britain*, a person may elect to consider himself disseised for the sake of the remedy, but this doth not cause him to be *actually* out of possession. Wherever a person here can bring ejectment, he can bring trespass, at his option. Nay, he can bring both at the same time; for if *A* enters upon the land of *B*, takes possession of it, and cuts down trees, or cultivates the ground, *B* may bring trespass to recover damages for the cutting or cultivation; and he may also at the same time prosecute ejectment with a view of *dispossessing A*; and after judgment in ejectment *B* may bring an action for mesne profits, arising *subsequent to the writ of trespass*.

Such is considered to be the law in this state. The plaintiff in ejectment may bring an action of trespass for the mesne profits, pending a writ of error. *Run. Eject.* 423. *Donford vs. Ellys*, 12 *Mod.* 138.

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BUCHANAN, J. delivered the opinion of the court. The court agree with the court below in the opinion contained in the bill of exceptions on which this case is brought up.

The question is, whether, in an action of trespass brought in the name of the lessor of the plaintiff against the tenant in possession, for mesne profits, from the time of the demise, it is necessary for the plaintiff to prove an entry or actual possession in him after the recovery in ejectment?

On that question the court have no doubt.

The tenant in possession is estopped by his confession of lease, entry and ouster, and cannot controvert either the title or possession of the plaintiff; and it is sufficient for the plaintiff to produce the judgment alone, without showing the writ of execution executed, or possession acquired in any other manner.

JUDGMENT AFFIRMED.

JOHNSTON VS. COPE *et al.*

JUNE.

APPEAL from Baltimore County Court. *Assumpsit* by the appellant against the appellees, on an agreement for the sale of six bales of linens called *Flanders* sheetings, to be furnished and supplied by the latter to the former, of good and merchantable linens, at and for a large sum of money, and for which payment had been made. The declaration stated, that although six bales were afterwards delivered, yet they were not good, sound, merchantable linens, but on the contrary bad and unmerchantable, &c. The general issue was pleaded; and at the trial the plaintiff prayed the court to direct the jury, that if they should be of opinion from the testimony, that the merchandize in question was sold to the plaintiff for the full merchantable price, that it implies a warranty that the same was, at the time of the sale, good, sound and merchantable; and that if the merchandize in question was unsound, and that unsoundness was not obvious to the buyer at the time of the sale, in the state in which such goods are usually sold, the plain-

In *assumpsit* on a verbal agreement to recover the price paid for merchandize proved to be unsound, sold and delivered by the defendants to the plaintiff.—*Held*, that the bare circumstance of selling goods and chattels for a full price, does not of itself raise a warranty; and that the seller is not responsible for their unsoundness, unless he warranted them to be sound, or knew they were not at the time of the sale, in which latter case he would be liable for the fraud.

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tiff is entitled to recover on the ground of such implied warranty. This direction the court, [*Nicholson*, Ch. J. and *Hollingsworth*, A. J.] refused to give, being of opinion that the bare circumstance of selling goods and chattels for a full price, does not of itself raise a warranty, and that the seller is not responsible for the unsoundness of such goods and chattels, unless he warranted them to be sound, or knew of their unsoundness at the time of sale, in which latter case he would be liable for the fraud. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, GANTT, and EARLE, J.

*Nisbet*, for the Appellant. The common law maxim of *caveat emptor* is now exploded, and the more reasonable principle of the civil law, "that a fair price implies a warranty," has been adopted. 2 *Wood. Lect.* 415, & 1 *Pow. on Cont.* 150. The plaintiff is not bound to show that the defendant knew of the defect or damage in the things sold; for a man ought to have skill in the way of his business, and ignorance is considered as a deceit upon those with whom he deals. 3 *Wood.* 199. *Bevingsay vs. Ralston*, *Skin.* 66; & *Denison vs. Ralphson*, 1 *Vent.* 366. The court below grounded their opinion principally on a case of *Parkinson vs. Lee*, 2 *East*, 314, and the case of *Stuart vs. Wilkins*, 1 *Doug.* 20. The first of these cases was a sale by sample, and the commodity was proved to be the same as the sample. That is a very different case from the one before this court, where the sale was of linens in bales, without opening them, and without the exhibition of a sample. The court below go farther in their decision than the case required; and so far as they appear to decide the case before the court, it is a mere *obiter* opinion, and that founded on another *obiter* opinion of Lord Mansfield; for the case *Stuart vs. Wilkins* was merely as to the form of the declaration. The common understanding of mankind, and the general usage of merchants, is in favour of the implied warranty. An instance has rarely occurred where, on a sale of goods by invoice or in bales, a concealed damage has been discovered, in which the vendor has refused to refund the money, and take back the goods, or compensate for the injury sustained. Upon this principle substantial

justice is done, for the loss will ultimately fall upon the person who knew of the damage, and fraudulently packed up the goods as merchantable.

*T. B. Dorsey*, for the Appellees. The common law principle of *caveat emptor* never has been exploded as to the quality of goods sold, but only as to the title. 2 *Blk. Com.* 451, (and *Christian's* notes.) That there is no implied warranty as to the quality, is evident from 3 *Blk. Com.* 164. *Parkinson vs. Lee*, 2 *East*, 314. *Williamson vs. Allison*, *Ibid* 446. If a sound price implies a warranty, why are express warranties ever made, or why are actions of deceit ever brought? The universal understanding of every man buying and selling is against implied warranties. The authorities of 2 *Wood. Lect.* 415, 3 *Wood. Lect.* 199, and 1 *Pow. on Contracts*, 150, are the incautious dicta of commentators, unsupported by the decision in *Denison vs. Ralphson*, 1 *Vent.* 366, and *Bevingsay vs. Rulson*, *Skin.* 66, on which they profess to be founded; these cases were on express warranties, and it was therefore properly decided that the *scienter* need not be proved.

JUDGMENT AFFIRMED.

### WILSON VS. MITCHELL.

JUNE.

APPEAL from *Baltimore County Court*. This was an action of *slander*, brought by *Alexander Mitchell*, the appellee. The declaration contained four counts. After stating that the appellee had been, and continued to be, a merchant, and commission merchant, and a faithful buyer and seller of merchandize, &c. the first count of the declaration charged *David Wilson*, the appellant, with speaking the following false and scandalous words of the appellee, "that he sold goods and merchandizes on commission for a higher sum than he returned an account of sales for; and that he cheated his employer, by putting part of the money for which the goods sold, in his (the appellee's) pocket." The second count, after stating that

Where, in the return of a commission issued to a foreign country to take testimony, the commissioners oath appears to have been taken, and is certified by the commissioners to have been duly taken, it is sufficient, without other proof, that the persons administering the oath had authority for that purpose. In slander, one of the counts in the declaration charged the defendant with having made a voluntary affidavit, and caused certain false and malicious lies to be written therein, and among others, that "there was a certain quantity of *American soap*, which to his certain knowledge was sold at *Curacao* by the said A. M." (the plaintiff), "at six dollars current money," and the affidavit, as offered in evidence by the plaintiff, stated the same words, except that the words "per box" were added after the words "six dollars."—*Held* to be a fatal variance.

The plaintiff cannot under the act of 1809, ch. 153, take a judgment on a count in his declaration upon which he had given no evidence although there is a general verdict in his favour.

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the appellee had in his business aforesaid sold at *Curacoa* a certain number of boxes of soap, it being part of the outward bound cargo of the sloop *Delight*, for and on account of a certain *Marcus M'Causland*, and the said *Alexander*, for the sum of five dollars and an half for each box, and had returned a true and faithful account of the sale to the said *M'Causland*, yet the appellant *David*, well knowing, &c. falsely spoke these words; "He (meaning the said *Alexander*,) sold the soap, (meaning the aforesaid boxes of soap,) at six dollars per box, but has returned an account of sales to *Marcus M'Causland*, (meaning the said *Marcus M'Causland*,) only for five dollars and an half." The third count charged that the said *David*, on the 10th of April 1801, voluntarily made a certain written paper, purporting to be an *affidavit*, and purporting to be sworn to before a certain *G G P*, and caused certain false statements of and concerning the said *Alexander*, in his business aforesaid, to be written, &c. in the following English words, viz. "And this deponent, (meaning thereby the said *David*,) further deposes and declares, that in the outward bound cargo of the sloop *Delight*, there was a certain quantity of *American* soap, which to his, (meaning the said *David's*,) certain knowledge, was sold at *Curacoa* by the said *Alexander Mitchell*, (meaning the aforesaid *Alexander*,) at six dollars current money of the *U. S.* of *America*; any thing in the account of sales, (meaning the aforesaid account of sales returned to the said *Marcus M'Causland*,) rendered by the said *Alexander Mitchell*, (meaning still the said *Alexander*,) to the contrary notwithstanding." The fourth count charged, that the said *David*, out of his further malice and envy against the said *Alexander* before had and conceived, speaking of the said *Alexander* in his business aforesaid, &c. charged him with the infamous and hurtful crime of fraud and deceit, and with selling the goods, &c. intrusted to his care, for more money than he returned in his account of sales, and with fraudulently and dishonestly keeping out of the monies for which the goods, &c. were sold, more than he was entitled to for his commission, &c. The general issue was pleaded.

1. The Plaintiff at the trial offered to read in evidence the testimony taken under a commission, issued at his instance out of the county court, and directed to *Joseph Foulke* and *Henry Basden*, of the *Island of Curacoa*. At the

foot of the form of the oath, written on the commission, to be taken by the commissioners, were written the names of the commissioners, with their seals, and also these words—"Sworn before us the 28th of May 1806.

*Joseph Ingram*  
*P. L. Brion."*

Then followed the interrogatories and answers of witnesses, and the whole authenticated by this certificate—"We, the undersigned commissioners, do hereby certify to the honourable the judges of *Baltimore* county court, that after we had severally taken the oath directed in said commission, and administered the oath to *Clement Davis*, whom we appointed as our clerk in said commission directed, that we proceeded to examine the witnesses produced; and we do certify, that the annexed answers were made to the annexed interrogatories. As witness our hands and seals this 28th day of May 1806.

*Joseph Foulke, (L. S.)*  
*Henry Basden, (L. S.)"*

The defendant's counsel objected to the admissibility of the testimony taken under this commission, on the ground that the commission did not appear to have been duly executed. But the court, [*Nicholson, Ch. J. and Hollingsworth, A. J.*] overruled the objection, and permitted the commission and depositions to be read in evidence to the jury. The defendant excepted.

2. The plaintiff, in support of the issue joined on the *third count* of his declaration, offered to read in evidence an affidavit, dated the 10th of April 1801, and proved to have been made before *G. G. Presbury*, one of the justices of the peace for *Baltimore* county, by the defendant, (*Wilson*,) and to have been signed by *Wilson*. The only part necessary to be stated is this, viz. "And this deponent deposes and declares, that in the outward bound cargo of the sloop *Delight*, there was a certain quantity of *American* soap, which to his certain knowledge was sold at *Curacoa* by the said *Alexander Mitchell*, at six dollars *per box*, current money of the *U. S. of America*, any thing in the account of sales rendered by the said *Alexander Mitchell* to the contrary notwithstanding." The defendant objected to the reading of this paper to the jury. But the court, [*Nicholson, Ch. J. and Hollingsworth A. J.*] overruled the

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objection. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Harper*, for the Appellant. 1. The question under the *first* bill of exceptions, arises on the ground that it does not appear that the commissioners, named in the commission, took the oath required, before some person legally authorised to administer it. The court will not presume that the persons, before whom the oath appears to have been taken, had proper authority. This is not similar to *Bryden vs. Taylor*, 2 Harr. & Johns. 396, nor *De Sobry vs. Terrier*, *Ibid* 191. In the former case, the court presumed that the person, who acted as a justice, was such, because they were bound to know who were the justices of the peace, records thereof being in the court; but this court are not bound to know, nor have they the means of knowing, the officers of a foreign country; they can only know legally, by having it certified to them under the seal of such country. The court are bound to notice a *public seal*, as in *De Sobry vs. Terrier*, such seals being evidence of themselves.

2. The *second* bill of exceptions rests upon a variance between the *third* count in the declaration, and the affidavit offered to support it. In that count it is stated that the soap was sold at six dollars for *the whole quantity*; and the affidavit stated it to have been sold at six dollars *per box*. This is a substantial variance. But even if it was not, it would still be fatal; for where a written instrument is professed to be set out, it must be done word for word.

*Winder*, for the Appellee. 1. The objection to the execution of the commission offered in evidence in the *first* bill of exceptions, has no force. If this commission is defectively executed, there never was one legally executed. Here the county court delegated an authority to certain persons, who certify that they have performed what the court directed. If this is not evidence, then the court are not to believe that the commissioners examined the witnesses; and they must have other proof that the depositions of the witnesses were properly taken. In the cases of *Bryden vs. Taylor*, and *De Sobry vs. Terrier*, the ob-

sections did not arise under commissions issued from the court.

2. There must be a clerical mistake in the third count, in the omission of the words *per box*. The objection in the court below was not on this ground, but because the affidavit was not set out at length. The great strictness in setting out the whole instrument has been greatly relaxed; and where the substantial words are proved, it is now held to be sufficient. This is the case of a *libel*. Here the reference is to the affidavit, and the defendant has notice of the words charged and relied on. It is so in a *libel*, where the publication is referred to, and it may be known.

3. There being a general verdict in this case, and there being other counts in the declaration, which are good, the action can be sustained, and the judgment may be entered on any one of the good counts, under the act of 1809, ch. 153.

CHASE, Ch. J. The court could never permit the plaintiff to take a judgment on a count upon which he had given no evidence.

The court concur with the court below, in the opinion expressed in the *first* bill of exceptions, but dissent from that in the *second* bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

### AYRES VS. GRIMES.

JUNE.

APPEAL from *Harford* County Court. *Replevin* for a slave, brought by the appellant against the appellee. The defendant pleaded *property, non cepit* and *limitations*. General replications and issues were joined. The plaintiff at the trial proved, that the slave was originally the property of *Josias Slade Bull*, who, in consideration of £110 paid by the plaintiff, bargained and sold the slave to the plaintiff, by an instrument of writing dated the 18th of March 1801. This bill of sale the plaintiff offered in evidence to the jury. It appears to have been signed and sealed by *Bull*, and acknowledged by him on the same day, before a justice of the peace of *Harford* county. The plaintiff also offered to prove, that this endorsement on it,

An instrument of writing, purporting to be an original bill of sale, and to have been signed and sealed by the vendor, and to have been duly acknowledged by him before a justice of the peace, with an endorsement thereon, proved to be in the handwriting of a person accustomed to write in the clerk's office of the county, stating that it had been duly recorded in the land records of the county—*Held*, to be sufficient evidence

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"Received and recorded the 18th day of March 1801, in Liber H. D. No. P, folio 446, one of the land record books of *Harford* county court, and examined by *Henry Dorsey*, clk." was in the handwriting of a young man accustomed to write in the clerk's office of *Harford* county, and not in the handwriting of the clerk himself. To this evidence the defendant objected. And the county court, [*Nicholson*, Ch. J.] refused to permit the bill of sale to be read in evidence, neither considering the endorsement as evidence of its execution, nor of its recording. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Harper*, for the Appellant. The original bill of sale, executed, acknowledged, and recorded on the same day, and the clerk's endorsement thereon of its having been admitted to record, were offered in evidence, and the question is, whether these acts amount to proof of the execution of the bill of sale, and of its having been recorded? The act of July 1729, *ch. 8, s. 5*, directs, that where the property remains in the hands of the seller, the bill of sale must be recorded within twenty days. Here there is no evidence that the property did not remain in the hands of *Bull*. The act of the parties raises a presumption that it was such a bill of sale which the law required to be recorded, unless the contrary is proved. The certificate of the clerk is sufficient evidence of its having been recorded, and it is sufficient evidence of the execution thereof. The certificate being made by a clerk in the office, the court are concluded by it. It is not necessary that the clerk should sign the certificate *himself*, and if it is done by a clerk in the office, it is proof of itself that it was done by the clerk. If the name of the clerk was forged, then the bill of sale should have been proved. The certificate thus signed is not conclusive evidence, but it is *prima facie* evidence that the certificate is by the clerk, or by his authority; and to get rid of it, it must be proved to have been done without authority. The laws recognize deputy clerks, which shows that the clerk is not bound to perform the whole duties of his office himself, but that he

may act by deputy. The endorsement being sufficient, the sole question is, whether it is proof of the execution of the bill of sale?

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*Winder*, for the Appellee. It was not proved that it was the original bill of sale that was offered in evidence; not that it was necessary it should have been recorded. It purports to be a bill of sale, but there was no proof that it was one, and that it was necessary to be recorded. The certificate of the clerk is evidence from the seal of the office, and in no other way. The act of 1715, *ch. 47*, makes it necessary for the clerk to endorse the original deeds for lands, recorded by him in his office; but the act of 1729, *ch. 8*, does not make it necessary for the clerk to make such endorsements on bills of sale; and there being no such provision, the certificate cannot be received, unless under the seal of the court in the usual mode of granting exemplifications, &c. The endorsement being rejected, and not admitted as evidence, it was incumbent on the plaintiff to have proved the execution of the paper.

THE COURT dissented from the opinion of the court below. They referred to *Kennersley vs. Orpe*, 1 *Dougl.* 56, and *Peake*, 32.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

### RUSK VS. SOWERWINE.

JUNE.

APPEAL from *Baltimore County Court*. Replevin for a slave. The appellant was the plaintiff below. General issue and *limitations* were pleaded.

1. The plaintiff offered evidence, that *John Bailey*, being in his life-time possessed of a negro woman named *Hannah*, and being indebted to *Daniel Dulany*, deceased, to secure the debt, on the 12th of April 1769 executed a mortgage to *Dulany* of said negro slave, and other property, which was duly acknowledged and recorded, and was offered in evidence. And to prove that the slave in controversy was a descendant from *Hannah*, the plaintiff offered as a witness to that fact, a black woman named *Minta*; and on the defendant's objecting to her, as an incompetent witness, the plaintiff offered evidence that the witness, and the late *Benjamin Bannaker*, a black man of *Baltimore county*, were born of the same parents, and that the wit-

A free black person is an incompetent witness in a case where the parties are free white christians.

A witness having proved that he received a power of attorney from a person to act for her in all things relating to her estate, as well in collecting debts as in making sale of property, &c. Held, that unless the original power of attorney was produced, or proved to be lost, or that the party had issued a subpoena to the witness with a *duces tecum*, no evidence could be given of it.

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ness and *Bannaker* were always reputed to be free; and that their mother was also reputed to be free, and to be descended of free parentage, and did actually enjoy freedom. That *Bannaker* exercised in his life the rights of a free man in holding real property, in voting at elections, and being allowed and permitted to give evidence in courts of justice in cases in which free white citizens were concerned; but it did not appear that at the times *Bannaker* was so admitted as a witness, no objections were made to his competency. The Court, (*Nicholson*, Ch. J.) determined *Minta* to be an incompetent witness, the plaintiff and defendant being free white christian persons. The plaintiff excepted.

2. The plaintiff then proved, that *Dulany*, the mortgagee, above named, died in the year 1797, having by his last will and testament appointed his wife *Rebecca* his executrix, to whom letters testamentary were duly granted on the 25th of March 1797, copies of which will, dated the 13th of March 1786, and the letters testamentary, were offered in evidence. The plaintiff then produced to the court *William Cooke*, esquire, as a witness, and upon examining him, he proved to the court, that shortly after the granting of letters testamentary to *Rebecca Dulany*, he received a power of attorney from her, authorising him to act for her in all things relating to the said estate, as well in collecting the debts due to the testator, as in making sale of the real and personal estate belonging thereto; and that he received the power of attorney while he resided at *Annapolis*; that on his removal to *Baltimore* he supposed it might have been mislaid; for that having occasion to refer to it not long since, he had looked among his papers but could not find it; that he did not make very strict search for it, and believes that it is among his papers, because all his papers are kept under lock and key, and few persons have access to them except himself. The Court, (*Nicholson*, Ch. J.) determined, that unless the original power of attorney was produced, or proved to be lost, or that the plaintiff had issued a *subpena* to the witness, with a *duces tecum*, the plaintiff could not give any evidence whatever of the power of attorney to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J. by

*Harper*, for the Appellant; and by  
*Boyd*, for the Appellee.

THE COURT agreed with the court below in the opinions expressed in both of the bills of exceptions.

JUDGMENT AFFIRMED.

TURNER VS. BOUCHELL'S EX'RS. and JESTER.

JUNE.

APPEAL from a decree of the Court of Chancery, dismissing the bill of complaint. The bill filed on the 7th of March 1797, by *John Turner*, and *Rachel* his wife, stated that *John Vansant*, father of *Rachel*, the female complainant, being seized and possessed of sundry tracts of land in fee simple, and possessed of the interest and term of years unexpired and then to come, of two leases for 80 years, of two *Grist Mills*, one lease dated the 21st of March 1744, and the other the 26th of April 1764, and having divers debts due to him on bonds, &c. amounting to £1654 13 0 current money, and being indebted to *Owen Jones*, and others, in the sum of £4681 1 8 current money, on bonds, he did, on the 1st and 3d of September 1766, execute to the said *Jones*, and others, a mortgage deed for all the said real property, except the parcels of leased lands, in order to secure to them, and the other creditors, the payment of the debts so due to them respectively; and he did at the same time assign the debts so due to him, and mortgage the said leasehold property to the said *Jones*, and others, for securing the debts so due from him, and did empower them to collect the said debts, and apply the same towards the discharge of the debts so due from him. [By these mortgages *Vansant* was to remain in possession of the lands, &c. and take the profits, &c. for five years, if he performed the covenant therein mentioned, by paying annually a certain part of the debt; and at the end of five years, or upon failure to pay, &c. (the debt or any part being unpaid,) *Jones* and others were to sell all the lands, &c. and apply the proceeds to

but any advantage resulting therefrom should devolve on the other creditors of the testator, and the right of the surplus, if any should remain after payment of the debts, should vest in his representative, upon the principle that he who accepts a trust takes it for the advantage of the persons for whom he is trusted, and not for his own.

The court of appeals having reversed the decree of the court of chancery, made a statement of the account between the parties, and decreed accordingly, and also decreed that the chancellor make and pass all necessary orders for carrying their decree into effect.

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On a bill in chancery by R, the representative of J, deceased, to obtain from B, the executor of J, an account of his administration of the personal estate, and payment of the balance due from him; also to obtain from B a conveyance of certain tracts of land, which had been mortgaged or conveyed in trust, &c. in 1766 by J, to certain of his creditors, and by them conveyed to B, on receiving the balance of the mortgage debt:—*Held*, that the deeds of 1766, from J to his creditors, are to be considered as mortgages or deeds of trust made to secure the payment of money due to certain creditors of J; that the redeemable quality incident to mortgages, or the resulting use, was not extinguished or destroyed by the power vested in the deeds to sell the lands.

That B being the executor of J, and having compounded the debts due on the mortgages or deeds of trust, with the creditors of J, for a sum much below the value of the lands, should not take any benefit of the composition to himself;

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payment of the debts, &c.] That *Vansant* remained in possession of the real and leasehold property so mortgaged, and enjoyed the profits and benefits arising therefrom until his death, which happened on the 1st of March 1773, having duly made his last will and testament, and thereby appointed his wife, and *Sluyter Bouchell*, executor and executrix. That the wife of *Vansant* did not take upon herself the execution of the will, but that *Bouchell* only took upon himself the execution thereof, and to him only letters testamentary thereon were granted. That the debts so due to *Vansant*, and by him assigned as aforesaid, were collected and applied to the discharge of the debts so due from him, and that *Vansant* had, during his life-time, made divers payments to *Jones*, and others, on account of the debts due to them, and the other creditors, and that there did not remain due to them, at the time of his death, more than about £1200 current money. That after the death of *Vansant*, his executor, *Bouchell*, obtained possession of the goods and chattels which were of *Vansant* at the time of his death, and which were not included in either of the said mortgage deeds, to the amount of more than £320 current money. That at the time of the death of *Vansant*, divers persons were indebted to him by bond, &c. to the amount of at least £1000 current money, over and above, and besides the debts so as aforesaid assigned; all which were or might have been received and collected by *Bouchell*, and for which he ought, as executor, to be accountable. That *Bouchell*, after the death of *Vansant*, took into his possession all the bonds, &c. which might prove the debts due to *Vansant*, and still has them, it is believed, in his possession. That *Bouchell* hath not yet rendered an account of his executorship, or settled any final account thereof, nor rendered any complete inventory or list of debts due to his testator, or of money by him received on account of the said debts. That on the 30th of June 1775, there being at that time the sum of £1200 still remaining due to *Jones*, and the other creditors, secured by the deeds of mortgage, *Bouchell*, the executor, paid the said sum to the said creditors, and took a conveyance to himself from *Jones*, and others, of the lands and tenements, fee simple, and leasehold, so mortgaged to them. That *Bouchell*, immediately after the execution of the last mentioned deed, took possession of all the lands and tenements, with the

houses, mills, and other improvements thereon, which had been so mortgaged, and hath holden the same, and taken the profits thereof ever since. That the mother of the female complainant is dead, intestate, and that she is the sole heir and representative of *Vansant*, her father, and also of her said mother. That she was an infant when she intermarried with the other complainant. That the goods, &c. which were of *Vansant*, which came to the hands of *Bouchell*, and have been received by him, together with the rents and profits which have been received by him, and which have arisen from the mortgaged property since it has been in the possession of *Bouchell*, amounts to much more than the sum of £1200, so as aforesaid due, with all other debts due from *Vansant*, paid by *Bouchell*, and the interest thereon due; and therefore, that *Bouchell* ought not only to convey to the complainants the mortgaged premises, but also to account and pay over to them the balance which may be due to them of the personal estate, for which he is accountable as executor of *Vansant*, and out of the profits of the lands and tenements so conveyed to him, after paying the debts due from the estate of *Vansant*, including the sum of £1200 so paid by *Bouchell*, together with interest thereon. That *Jonathan Jester* now is, and for several years past has been, possessed of the lands and tenements which were so as aforesaid mortgaged, by virtue of a lease from *Bouchell* to him, *Jester*, subject to the annual rent of £110 current money; and that one year's rent is now due, and not yet paid, by *Jester* to *Bouchell*. The object of the bill was therefore to obtain from *Bouchell*, as executor of *Vansant*, an account of his administration of *Vansant's* personal estate, and a payment of the balance which should appear to be due from him; another object was to obtain from *Bouchell* a conveyance to *Rachel*, one of the complainants, of the said tracts of land and grist-mills, which had been mortgaged by *Vansant* to *Jones* and others, as before stated, and by them conveyed to *Bouchell*, on receiving from him the balance of the mortgage debt; and another object was to compel *Jester*, to whom *Bouchell* had leased the lands, to account with the complainants for, and pay them, what rent is or shall be due from him for the lands so leased. *Bouchell* having died, a bill of revivor was filed against his executors. On the coming in of the answers of the executors of *Bouchell*, a commission was issued, and

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testimony taken under it. By agreement between the parties, accounts were stated by the auditor, to which both the complainant and defendant excepted. The cause was argued by counsel.

HANSON, Chancellor, (June 1805.) It is to be remarked, that before the equity of the case was argued, accounts were stated by consent of the parties, in order, as it has been said, that from the statement the chancellor might be enabled to determine whether or not there was equity; that is to say, as he supposes, whether or not there is any thing due from the defendants to the complainants. But that the complainants were entitled to an account, without a previous statement, could not, he thinks, be doubted. It is not necessary to prove that a man owes money, before he shall be obliged to render an account of a trust. The chancellor is clearly of opinion, that *Bouchell* should be considered as the assignee of the mortgage given by *Vansant* to his creditors, or of the interest, whatever it was, which the creditors, who are the grantees in the deeds by him executed, derived from the said deeds.

Let it be supposed that the creditors, mortgagees or trustees, had not conveyed the property to *Bouchell*, and that a bill were filed against them for a redemption, or a sale of the property under the direction of this court, can any thing be more certain than that the terms of redemption would be the payment of whatever should remain due after crediting the payments made to the creditors, and the sums received from the debtors of *Vansant*, contained in the list mentioned in the deed, or with the whole amount of the list, supposing the whole to be chargeable to them, without proof of their actual receipt? Can it, on deliberation, be conceived, that if the creditors and trustees, or mortgagees, had conveyed their interest to a stranger, they would thereby place *Vansant's* representatives in a better condition than they were in before the conveyance? Certainly not; and the representatives could not possibly be entitled to a conveyance of the property until the debts, for which it was pledged or conveyed, should be fully discharged, nor could the representatives be entitled to any part of the money arising from a sale under the authority of this court, until the object for which the deeds were executed should be fully obtained.

But *Bouchell* being *Vansant's* executor, and the creditors, trustees or mortgagees, having conveyed to him, for the con-

sideration of £1200, it is contended, that he must be considered as having obtained the conveyance for the benefit of *Vansant's* representatives, he having, at the time of the conveyance, assets, after having paid all *Vansant's* debts, except those due to the creditors mentioned in the deeds of mortgage, sufficient to make the said purchase.

If the said creditors had due to them at that time only £1200, and it was their meaning, on the receipt of that sum, to release or restore the pledge, how improper was *their* conduct, as well as that of *Bouchell*; and how little interested could they be in acting as they did? Surely they ought to have conveyed the fee simple property at least to *Vansant's* heir, and this, as honest intelligent men, it is to be presumed, they would have done.

It is impossible to avoid the remark, that *Vansant* died in confinement, into which he was thrown on account of his debts, and that this was an event, not at all probable, supposing him to have been solvent at the time of his death. However, as the complainants are entitled to, and claim, an account, it is proper for the chancellor to direct it to be stated.—*Decreed*, that the defendants, as executors of *Bouchell*, account with the complainants; and that the auditor of this court state the account, charging *Bouchell* with the amount of the inventory, and the amount of the sperate debts by him returned; and with all other debts or things by him received, or the value thereof, and all debts legally proved to be due to *Vansant*, not barred by the act of limitations, which might have been received, and which, from gross negligence, were not received. On the other side, the auditor is to charge those debts due from *Vansant* which were paid by *Bouchell*, the debt or debts due from *Vansant* to *Bouchell*, the sum of £1200 which he paid to the creditors, mortgagees, and the sum which remained due to them after deducting the £1200, and the amount of the list of debts to them assigned, excluding such of the debts, if any there be, received by *Vansant* or by *Bouchell*. The auditor having stated the account or accounts, is to make his report to the chancellor, subject to exceptions, and be done with as to the chancellor shall seem just.

The chancellor thinks proper to remark on some of the authorities which have been cited. "An executor, purchasing an incumbrance, must be supposed to purchase in or-

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der to protect the title for the representative of the testator." This is at least the full amount of one authority; but the chancellor presumes the rule or position to be confined to the case of an executor, "who has assets or money belonging to the estate, with which he purchases." If the executor has nothing in his hands, common sense must say, that he is on a footing with any other purchaser, who, by purchasing, places himself in the room of the mortgagee. "An executor purchasing with his own money, and giving the full value for the mortgaged land, shall not hold it as assets." The meaning of this is not plain. Suppose the executor does not give the full value—what then? The chancellor conceives the true rule to be, that an executor, if he has assets, is bound to clear a mortgage, and that if he purchases when he has assets, although he may pretend to purchase with his own money, he shall be considered as purchasing for the representative, or protecting his title, there being no other person to purchase or protect.

In the present case it appears to the chancellor, that *Bouchell*, at the time of his purchase, had not the money in his hands, or any part thereof. It appears too that it was the interest of *Vansant*, and the creditors, when he executed the deeds, that they should have a right to dispose absolutely of the property, in case the debts were not paid; and that at the time of their conveyance to *Bouchell*, neither party had an idea of his redeeming a mortgage by paying the balance of the debts, or of his purchasing for the benefit of *Vansant's* family. They might entertain erroneous ideas of the law, or of the principles of this court; but it must ever be the practice of this court to examine into the intention of parties; and although that intention may not be conclusive, it is at least a circumstance entitled to some influence, when aided by or coupled with other circumstances. Now the chancellor is satisfied, that at the time of the conveyance to *Bouchell*, the intent of the parties was, that he should take in his own right; that neither of them thought they were doing amiss; that the vendors thought they had an absolute right of disposal; that as executor, *Bouchell* was in no condition to purchase; that supposing him even to have a few hundreds as executor, it does not follow that making a purchase with 3, 4, 5, or 6 times the sum, he purchased for the heir. In short, *Bouchell* fairly stands in place of the mortgagees.

The account, stated by the auditor pursuant to the decree of the chancellor, made *Bouchell* a creditor to the estate of £9437 1 6. The complainants excepted to the account upon sundry grounds, which were stated,

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HANSON, Chancellor, (December 1805). It is unnecessary to comment or decide on the exceptions one by one. It is impossible that, with the allowance of any exceptions which are entitled to allowance, a statement made conformably to the principles and directions of the decree, can make the defendants, who are executors to *Bouchell*, in debt to the complainants, or the estate of *Vansant*, under whom the complainants claim—a decree then against the other defendant, *Jester*, is out of the question. DECREED, that the bill of the complainants be dismissed, but without costs. From this decree the complainants appealed to this court.

The cause was argued at the last term before CHASE, Ch. J. BUCHANAN, NICHOLSON, GANTT, and EARLE, J.

*Martin and Key*, for the Appellants, raised four points—1. That the leasehold estate, and the personal property, should be included in the inventory. 2. *Bouchell*, being executor, entitled to equity of redemption, if he bought in he can charge no more than he gave; and he could only buy in as executor, and not for his own benefit. 3. That when the executor bought in, there was personal estate sufficient to pay the incumbrance, &c. without a sale of the leasehold property. 4. That the executor was answerable for all the debts due to the testator, unless he showed they could not be recovered, &c. On the *second point*, they cited *Anon.* 1 *Salk.* 155. *Whelpale vs. Cookson*, 1 *Ves.* 9. *Holt vs. Holt*, 1 *Cha. Ca.* 191. 2 *Fonbl.* 191; and *Ogle vs. Tasker*, (in the court of chancery before the revolution). And on the *fourth point*, they cited 14 *Vin. Ab. tit. Inventory*.

*Johnson*, (Attorney General,) and *Winder*, for the Appellees, cited 2 *Fonbl.* 191, 313, 414; and *Darcy vs. Hall*, 1 *Vernon*, 49.

The female appellant having died after the argument, her death was suggested.

*Curia adv. vult.*

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THE COURT, at this term, in their opinion stated, that the deeds of the 1st and 3d of September 1766, from *Vansant* to *Jones* and others, are to be considered as mortgages, or deeds of trust, made to secure the payment of money due to certain creditors of *Vansant*; that the redeemable quality incident to mortgages, or the resulting use, was not extinguished or destroyed by the power vested in the deeds to sell the property.

That *Bouchell*, being the executor of *Vansant*, and having compounded the debts due on the mortgages or deeds of trust, with the creditors of *Vansant*, for £1200, a sum much below the value of the lands and premises, shall not take any benefit of the composition to himself; but any advantage resulting therefrom shall devolve on the other creditors of the testator, and the right to the surplus, if any shall remain after payment of the debts, shall vest in his representatives, upon the principle, that he who accepts a trust takes it for the benefit of the persons for whom he is trusted, and not to benefit himself. This is established on the soundest principles of equity, with the view of removing all temptation from the trustee to promote his own interest by violating his trust—*Decreed*, that the decree of the court of chancery be *reversed*; also decreed, that the appellees do by a good and sufficient deed, convey to *Turner*, the surviving appellant, the interest and term of years unexpired, and now to come, of a certain lease for 80 years of a certain *Grist Mill*, situate, &c. bearing date the 21st of March 1744; and also the interest and term of years unexpired, and now to come, of another certain lease for 80 years of a certain other *Grist Mill*, situate, &c. bearing date the 26th of April 1764. Also decreed, that the appellees deliver to the appellant full and peaceable possession of the interest and terms of years unexpired, and now to come, of and in the said leases for 80 years as aforesaid, of the said *Grist Mills* herein before mentioned to be granted as aforesaid. Also decreed, that the appellees, executors of *Bouchell*, do pay to the appellant the sum of £1626 16 5, current money, the said sum having been ascertained agreeably to the account hereto annexed; and that the appellees do also pay to the appellant the costs which accrued in the court of chancery, and in this court, and by the appellant expended and paid in the said courts, amounting to, &c. And also decreed, that the

chancellor make and pass all necessary orders for carrying this decree into full and complete effect.

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The account referred to in the decree is as follows:

Dr. <i>Shuyter Bouchell</i> to the estate of <i>John Vansant</i> .	
To Amount of Inventory	£395 14 7
To Shallop	33 6 8
To <i>Falconer's</i> two Judgments	85 10 5
To <i>Fountain's</i> debt	2 15 0
To Sperate debts	161 16 0½
To Cash paid on lease	40 0 0
To Cash received for negro and for his hire	160 0 0
To Rent of the mill property from March 1773	
to April 1775 at £50	100 0 0

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£979 3 8½

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Supra	Cr.
By <i>Vansant's</i> debt on bond to <i>Bouchell</i> , with interest to April 1, 1774	552 18 10
By 5 years rent of the leased property in the state of <i>Delaware</i>	305 0 0
By commission on £655 18 10, at 10 per cent.	65 15 10
By balance due <i>Vansant's</i> estate	55 9 0½
	£979 3 8½

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To balance due <i>Vansant's</i> estate 1 April, 1775	55 9 0½
By this amount paid to the creditors, &c.	1200 0 0
	1141 10 11½
By interest from 1 April 1775 to 3 Sept. 1783	576 19 6

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To rent of Mill property from 1 April 1775 to 4 July 1776	62 10 0
	1659 0 5½
By interest on £1144 10 11½ from 3 Sept. 1783 till 1 January 1784	22 17 9
	1681 18 2½

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To rent of Mill property from 1 January 1781, when <i>Jester's</i> lease commenced, till January 1784	450	0	0
To interest on £150 from 1 January 1782 to 1 January 1783	9	0	0
To interest on £150 from 1 January 1783 to 1 January 1784	9	0	0
	<hr/>	468	0 0
		1213	18 2½
By interest on £1144 10 11½ from 1 January 1784 till 1 January 1785		68	13 5
		1282	11 7½
To one year's rent of Mill from 1 January 1784 to 1 January 1785		150	0 0
		1132	11 7½
By interest on balance to 1 January 1786		67	19 1
		1200	10 8½
To one year's rent of Mill to 1 January 1786, and so on for each and every year, until the 1 of January 1788, at £150, and afterwards to the 1 January 1800, at £110 per annum, crediting one year's interest on the balance due at the end of each year down to the 1 January 1800, leaving a balance then due to <i>Vansant's</i> estate of		102	8 1
To interest thereon from 1 January 1800 to 1 January 1810 (a).		61	8 4
To rent of Mill from 1 January 1800 to 1 January 1810, at £110		1100	0 0
To interest on £110 from 1 January 1800 to 1 January 1810		66	0 0
To do. on do. from 1 January 1801, and so on from every succeeding 1 January, until from 1 January 1809, to 1 January 1810		297	0 0
		<hr/>	£1626 16 5

DECREE REVERSED, &c.

(a) This account was stated when the court were about to pass the decree at the last December term.

## TYSON VS RICKARD.

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APPEAL from Baltimore County Court. This was an action of *replevin*, brought by the appellee against the appellant. The defendant below, by his *avowry* justified the taking the goods, &c. being for one year's rent in arrear, amounting to \$893 75, of a lot of ground leased by him to William Belton. Three pleas were pleaded to the *avowry* by the plaintiff, the first and second, of the statute of *usury*, and the third, in bar *de injuria sua propria*; to all which pleas there were replications, each tendering an issue, but to the replication to the last plea only, issue was joined, and upon that issue a verdict was given for the plaintiff. Motion by the defendant, that judgment on the verdict be arrested, because there was no issue joined in the pleadings. The court overruled the motion, and entered judgment on the verdict for the plaintiff.

1. The plaintiff and defendant at the trial, admitted the following facts, viz. That William Belton was, at the time of executing the mortgage to John Hayes, legally and rightfully possessed of the lot and premises hereinafter mentioned, for the residue of the term of 99 years in the assignment from Alice Smith and John Smith to William Belton. That a deed of mortgage from William Belton to Robert Maxwell, dated the 25<sup>d</sup> of June 1801, was duly executed, acknowledged and recorded, for all that moiety of lot No. 64, in Baltimore town, which had been assigned and transferred to Belton, by Alice and John Smith, on the 10th of May 1794. That the said mortgage deed was made for the purpose of securing the repayment of \$2000, which had been lent and advanced by Maxwell to Belton, on a contract, whereby Belton had agreed to allow Maxwell an interest at the rate of eighteen per cent per annum.

These terms were acceded to by B, who executed a deed to T, and received from him a lease, reserving a rent equal to 15 per centum per annum on the sum advanced, payable quarterly, with a stipulation by T to reconvey the property at any time within five years, on payment by B of the sum advanced, with all arrearages of rent then due. Held, that on a question of usury it is the intention of the parties which gives character to the transaction, and no matter what the form, where the real truth and substance is a loan of money at more than an interest of six per centum per annum, no shield or device can take it out of the net of assembly against usury. That in the investigation of such questions, the original intention of the parties must often be come at by matter *de hors* the particular instrument of writing executed between them. That it should be left to the jury to decide upon the whole of the evidence, whether in the true contemplation of the parties, the transaction was a real sale by one, and a purchase by the other, or whether it was only colourable to hide a usurious loan. That a stipulation to repay the principal in money, is not necessary to constitute a loan; it is enough if the principal is secured, and not *bona fide* put in hazard; and it matters not what the nature of the security is, if it is sufficient. If the principal is secured, and the interest reserved is more than the law allows, it is usury. That every case of usury must depend on its own circumstances, and the intention of the parties, when it can be come at, and not the words used, must govern. That the legal construction of the lease from T to B, (no matter what it is,) cannot regulate the case, if it was not their intention that B might, by paying the principal at any time before the end of the first quarter, discharge himself from the rent due at the time of such payment; and that intention was matter for the jury.

Where the defendant pleaded three pleas in an action of replevin, to which the plaintiff replied, and tendered an issue to each, but issue was joined to the replication to the last plea only, and upon that issue a verdict was given for the plaintiff. On motion in arrest of judgment -- Held, that the not joining issue on the first and second replications was healed after verdict.

B authorized an agent to borrow for him a sum of money on an interest of 15 per centum per annum, to be secured by mortgage on a house and lot. The agent applied to T for the money, in the name of B, and made him acquainted with the terms of the contemplated loan. T replied he was willing to advance the money, but would have nothing to do with a mortgage, but that he would purchase the property for the sum required, and would rent it to B for a rent equivalent to an interest of 15 per centum per annum, with privilege to B to redeem the property for the sum advanced, on paying up the rent.

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on the money thus advanced, and that the payment of said interest, so to be allowed, was secured by a promissory note from *Belton* to *Maxwell*, which note was duly paid by *Belton* to *Maxwell*. That the principal sum of \$2000, so advanced on the mortgage, not being paid at the time stipulated in the deed for that purpose, *Maxwell* urged *Belton* for repayment thereof, and that *Belton* applied to *James M·Evoy*, a broker in the city of *Baltimore*, and requested him to borrow a sum of money, from 3000 to 5500 dollars, on mortgage of the same property before conveyed to *Maxwell*, as well for the purpose of repaying the money lent to him by *Maxwell*, as also to supply other wants of his own, and authorised the said broker to allow an interest of *fifteen per cent per annum*, on the money he might be enabled thus to procure on mortgage. That *M·Evoy* applied to *Nathan Tyson*, (the defendant,) to loan the sum of \$3500 to *Belton*, for which he should receive an interest of *fifteen per cent per annum*, and that the property so conveyed to *Maxwell* should be mortgaged to him to secure the repayment thereof. That on this application being made to him, the defendant immediately replied that he was willing to advance the money, but would have nothing to do with a mortgage, because he considered it a troublesome business, and gave *M·Evoy* an immediate and positive refusal to advance any money in that way; but said that he would make an absolute purchase of the property from *Belton* for the sum required, and would rent the property to *Belton* at a rent equivalent to an interest of *fifteen per cent per annum*, with a condition that *Belton* should have a right, when he pleased, (as *M·Evoy* then understood,) to purchase the property for the principal money advanced, on paying up the rent. That *M·Evoy* returned to *Belton*, and informed him of the terms on which the defendant would agree to advance the sum of \$3500; that *Belton* thereupon authorised *M·Evoy* to close the contract on the terms proposed by the defendant, and expressed his warm approbation thereof, observing at the same time it would be more advantageous to him to obtain the money in this way, than to let the property remain on mortgage to *Maxwell*, as he would now only pay at the rate of an interest of *fifteen per cent* instead of *eighteen per cent*. That in pursuance of the agreement so made through *M·Evoy*, *Belton* authorised the defendant to apply the sum of \$2000, part

of the \$3500, so agreed to be paid for the purchase of the property, to the payment of the debt remaining due on the mortgage executed to *Maxwell*, and to receive from *Maxwell* an assignment of the mortgage. That the defendant paid the sum of \$2000 to *Maxwell*, and *Maxwell* executed an assignment of the mortgage to him, in due form of law, by deed bearing date the 1st of April 1803. That the defendant paid the residue of the sum of \$3500 to *Belton*, and *Belton* on the 1st of April 1803, executed a deed in due form of law to the defendant, purporting to transfer all his right and equity of redemption to the property mortgaged to *Maxwell*; and that the defendant duly executed, acknowledged, and delivered to *Bolton*, a lease of the said property, bearing date the 1st of April 1803, reserving the annual rent of \$525 over and above the annual rent reserved by the original lease from *Smith* to *Belton*, to be paid quarterly in four equal payments, with a covenant that *Tyson*, at any time within five years, on payment of the full sum of \$3500, together with all arrearages of rent then due to him by *Belton*, would execute a release and assignment of all his interest and estate in the premises, to *Belton*—which lease has been duly recorded. That if the defendant had a legal right to make the lease to *Belton*, there was due to him, at the time of the distress, the sum of \$375. That the mortgage to *Hayes* was previous to that made to *Maxwell*. The plaintiff, to support the issue on his part, proved by two witnesses, who were house carpenters, and who had examined the house and lot mentioned in the deed from *Belton* to the defendant, that the same were worth, and would sell for \$7500, and by two other witnesses, one a master-builder, and the other a bricklayer, who had also made the same examination, that the house and lot were worth, and would sell for, \$6500, and that the lot alone was worth about \$4500. The defendant gave in evidence, that the house and lot were seven years ago worth \$4500. The plaintiff then prayed the court to direct the jury, that upon the statement of facts and evidence, he the plaintiff was entitled to recover. But the county court, [*Nicholson*, Ch. J. and *Hollnigsworth*, A. J.] refused to give the direction as prayed, but did direct the jury, that to constitute usury there must be a lending and borrowing at a greater rate of interest than *six per centum per annum*. When these facts occur, and are establish-

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ed, no device or stratagem whatever can evade the statute. If the contract is in the shape of a bond, note, mortgage or annuity, it matters not, the borrowing and lending at an illegal interest contaminate the whole transaction, and make it void. Where an annuity is sold, the mere circumstance of giving the privilege of redemption does not of itself constitute usury; but in the sale of an annuity, whether there is or is not a privilege of redemption, yet if the original contract was in fact a borrowing and lending, and the sale of the annuity only a device to avoid the statute, it is nevertheless usury. All the cases in the books refer to the original intention of the parties; and if in the case now before us, the jury should be of opinion that the original transaction was a borrowing and lending, and the deeds, executed in the particular form in which they appear, merely as a device to evade the statute, then the contract is usurious, and the deeds void. The circumstance of there being no covenant or bond by *Belton* for the repayment of the money does not vary the case; he had already given a pledge more than equivalent to the money advanced, if the jury believe the testimony in the case as to the value of the property. *Tyson* agreed to forbear in making absolute his title to the thing pledged, for five years, on condition of *Belton's* paying \$525 annually, and the obligation to redeem, though not formally expressed in the deed, is virtually in the value of the house and lot. The intention of *Belton* to borrow is palpable—it is admitted in the case; that of *Tyson* to lend is not admitted; and the fact of his intention to lend, and to use this form of conveyance as a colouring, must exist in order to constitute usury. It is a fact which the court cannot infer, as not being within our province, but must be found by the jury; and if they believe this fact, their verdict must be for the plaintiff. The *plaintiff* excepted to the *refusal* of the court to give the direction by him prayed, and the *defendant* excepted to the *direction* which the court did give.

2. The plaintiff then insisted, that the money which the defendant furnished to *Belton* was on loan, and not as money furnished for the purchase of the lot of ground above mentioned. The defendant then prayed the direction of the court to the jury, that to constitute a loan it is necessary for the jury to be convinced that it was the agreement between *Belton*, and him the defendant, that the principal

was at all events to be repaid to him the defendant in money. But the county court directed the jury, that if the agreement between the parties was, that *Tyson's* title to the house and lot should become absolute at the end of five years unless the money was then repaid, and the original agreement contemplated an accommodation of money by way of loan by *Tyson* to *Belton* for that time, that then the method of satisfying *Tyson* the money originally advanced, did not alter the nature of the transaction. The defendant excepted. *Verdict* and judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J.

*Martin, Harper and Purviance*, for the Appellant. 1. Upon the motion in arrest of judgment, and irregularity in the pleadings in not joining issues to the replications to the first and second pleas, and there being a verdict only upon the issue joined to the replication to the third plea, they cited *Bac. Ab. tit. Verdict*, (M.) 1 *Inst.* 227, and *Smith vs Raymond*, 1 *Day's Cases*, 189.

2. Upon the question of *usury* in the bills of exceptions, they cited the act of 1704, ch 69. *Murray vs. Harding*, 2 *W. Blk. Rep.* 862. *S. C.* 3 *Wils.* 396. *Lawley vs. Hooper*, 3 *Atk.* 278. *Green vs. Suasso*, 2 *Atk.* 231. *Irrham vs. Child*, 1 *Bro. Ch. Rep.* 94. *Spurrier vs. Mayoss*, 1 *Ves. jr.* 529. *S. C.* 4 *Bro. Ch. Rep.* 28. *Vin. Ab. tit. Usury*, (E.) *Bac. Ab. tit. Usury*, (C.) *Tate vs. Wellings*. 3 *T. R.* 531; and *Floyer vs. Edwards*, 1 *Cowp.* 115.

*Winder*, for the Appellee. 1. Upon the first question he cited *Bac. Abr. tit. Verdict*. (M) (X.) *Hill vs. Lewis*, 1 *Salk.* 133; and *Rex vs. Hayes*, 2 *Stra.* 844, 845.

6. Upon the second question, *Bac. Abr. tit. Usury*, (C.) *Hedgeborough vs. Rosenden*, 1 *Vent.* 254. *Morse vs. Wilson*, 4 *T. R.* 353. *Lowe vs. Waller*, 2 *Doug.* 740; and *Turner vs Bouchell et. al.* (ante 99.)

BUCHANAN, J. I perfectly agree in opinion, on both of the bills of exceptions, with the judges before whom this cause was tried in the court below.

On a question of *usury* it is the view, the intention of the parties, which gives character to the transaction, and no matter what the form, where the real truth and substance

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is a loan of money—a lending on one side, and a borrowing on the other, at more than an interest of *six per centum per annum*, no shift or device can take it out of the act of assembly.

In the investigation of such questions the original intention of the parties must often be come at by matter *de hors* the particular instrument of writing executed between them, otherwise the act of assembly would be a dead letter; and in this case I think the court below did right in leaving it to the jury to decide upon the whole of the evidence, whether in the true contemplation of the parties, the transaction in question was a real sale by one, and a purchase by the other; or whether it was only colourable to hide an usurious loan; and in directing them to give a verdict for the plaintiff below, if they found it to be the intention of *Tyson* and *Belton*, the one to lend, and the other to borrow—the amount of the rent reserved being equal to an interest of *fifteen per centum per annum*.

As to the second bill of exceptions. A stipulation to repay the principal in money is not necessary to constitute a loan; it is enough if the principal is secured, and not *bona fide* put in hazard; and it matters not what the nature of the security is, if it is sufficient. As if a man borrows £20 to pay £10 for interest for one year, and pawns goods to the lender of the value of £100, on a stipulation in writing by the lender, to return the goods on payment by the borrower of £20, with interest thereon—this is an usurious lending, though there is no undertaking by the borrower to repay the principal. So in this case the principal sum advanced by *Tyson* was secured by the deed from *Belton*. The true ground is, not that there must be a stipulation to repay the principal at all events in money, but that it must in some way be *secured*, as distinguished from being put in hazard; but whether it is secured by pawn or pledge, or a conveyance of land, or is by agreement to be returned in lands, goods or money, is not material. If the principal is secured, and the interest reserved is more than the law allows, it is usury.

The position contended for, “that whenever it is in the power of a borrower of money to pay the principal within a limited time without interest, it is not usury,” I conceive has no bearing upon this case; but is only applicable to cases in which the increased sum is stipulated for

*nomine penæ*, and there is no immediate reservation of interest, as in the case of a man lending £20, to receive £40 at the end of two years, or only £20 if paid at the end of one year, in which the payment of the smaller or larger sum is intentionally and expressly by the contract placed at the option of the borrower.

Every case of usury must depend on its own circumstances, and the intention of the parties, when it can be come at, and not the words used, must govern, [The judge here stated the facts, and then continued.]

The intention to negotiate a loan has been found by the jury, whose province it was to inquire into the meaning of the parties; and so far from the rent being reserved *nomine penæ*, or its appearing to have been the intention of the parties that *Belton* might discharge himself of all rent by payment of the principal before any rent had accrued, that is, before the end of the first quarter, it seems clearly to have been their understanding and intention that he should not; for the stipulation in the lease is to reconvey on payment of the principal, together with all arrearages of rent, which shows that they contemplated an accrual of rent, and that the money was not to be paid before such accrual.

No matter, therefore, what the strict legal construction of the lease from *Tyson* to *Belton* is, that cannot regulate the case, if it was not the intention of the parties, that *Belton* might, by paying the principal at any time before the expiration of the first quarter, discharge himself from the rent up to the time of such payment; and that intention was matter for the jury.

With respect to the matter in arrest of judgment—The not joining issue on the first and second replications was healed after verdict, and the motion properly overruled.

GANTT and EARLE, J. concurred.

CHASE, Ch. J. As I differ from my brethren of the court, I am induced, from respect for their opinion, to communicate the reasons which impelled me to dissent from their judgment.

I concur in opinion generally, that every case of usury must be decided on its own circumstances.

To make a contract usurious there must be a loan of money, wares, merchandize, or other commodity, to be

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paid or restored to the lender at a higher rate of interest than the act of assembly allows. To constitute usury it is essential that the thing lent is to be restored.

In this case it was a conditional sale of land and houses. A power was given to the vendor to avoid the sale, by the payment of the consideration money at any time within five years. A lease was made of the same property by the vendee to the vendor, reserving a sum of money equal to *fifteen per centum* on the sum for which the property was sold. The rent was payable quarterly. It was optional in the vendor to return the money or not; and if he had returned it within three months, he would have defeated the sale, and exempted himself from the payment of interest, or making any remuneration; so that, whether the money was to be returned or not, depended on the vendor, and on his opinion whether it would be most for his benefit to avoid the sale or not; it depended on the vendor whether any rent was to be paid. The inequality of price merely as such, cannot render the contract or sale usurious. The purchase was contingent, and defeazible by the vendor. The money was not to be repaid certainly, and at all events, nor was any rent or interest to be certainly paid. These ingredients are indispensably necessary to constitute usury.

It is the exclusive province of the jury to find facts; and it belongs to the court exclusively to decide the law arising on the facts found. It is necessary for the administration of justice, that the boundaries between the jurisdiction of the court, and the province of the jury, should be fixed. It appertains to the court to determine on the *legal* sufficiency of evidence to prove a fact in issue. As for instance, in an action of trover and conversion, conversion is the material fact to be found by the jury. Proof of a demand and refusal is evidence legally sufficient on which the jury may find conversion. To constitute a valid feoffment, livery is indispensably necessary. The proof of a deed of feoffment, and possession under it for a length of time, is legally sufficient for the jury to find livery. But proof of a demand would not authorise the jury to find the fact of conversion. So the proof of a deed of feoffment would not authorise the jury to infer livery, and find a feoffment, because the evidence is not legally sufficient. These are adduced as familiar instances, and of frequent

occurrence, to elucidate the subject. A lending is one of the ingredients to constitute usury, and the jury must find that fact, and that fact cannot be found without evidence legally sufficient to find it. The facts stated, negative a lending. *Tyson*, when applied to, refused to lend money on mortgage, but said he would purchase the property, and give a lease of it on a rent equivalent to the interest, at the rate of *fifteen per centum* on the purchase money. If a *bona fide* transaction, and there appears no evidence in the case to impeach it, the inequality of price cannot contaminate it; if it would, many of the purchases in and about *Baltimore* would be rendered suspicious. The rent to be paid being fixed, a certain *per centum*, with reference to the purchase money, cannot pollute it. Some of the witnesses prove the property worth \$7500, others \$6500, and others \$4500. The aggregate amount of these sums, divided by three, will leave the sum of \$6166, the price at which the property may be fairly estimated, which sum, at *nine per centum*, would produce \$551. *Ten per cent.* is the lowest rate at which the rent of houses and lots is fixed. There must be some evidence to prove the fact of lending, and that what was done was a mere device to colour and disguise the transaction, which in itself was usurious. There is no evidence stated, legally sufficient, from whence the jury could infer a lending, and that the several conveyances were colourable, and devised to conceal a contract which was usurious. The jury cannot arbitrarily find facts, but there must be evidence in the case legally sufficient to warrant the deductions and finding of the jury.

For these reasons I am of opinion that the judgment of the court below ought to be reversed.

JUDGMENT AFFIRMED.

HENDERSON'S LESSEE VS. PARKER.

DEC. (E. S.)

APPEAL from Worcester County Court. *Ejectment* for a tract of land called *Henderson's Beginning*. The general issue was pleaded. At the trial the plaintiff, (now appellant,) offered in evidence an original patent, granted on the 3d of February 1801, to the lessor of the plaintiff, for

The recital in a grant of the date of the certificate of survey, upon which the grant was founded, is not sufficient evidence of the time when the survey was made.

As where a grant of a tract of land issued after the time of the demise laid in a declaration in ejectment for the same land, and after the suit was brought, reciting the date of the certificate of survey to be prior to the time of bringing the suit, it was held, that the grant was not sufficient evidence of title, without producing the certificate of survey upon which the grant issued.

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the land for which the action was brought. The patent recites, that *Henderson*, on the 15th of April 1799, obtained out of the land office for the *Eastern Shore*, a special warrant to resurvey a tract of land called *Pig Pen*, originally on the 16th of July 1750, granted to *Robert Davis* for 50 acres; that in pursuance of the warrant a resurvey had been made, and a certificate returned to the land office, bearing date on the 15th of February 1800, and that he had paid to the treasurer the sum of £3 17 9, being the full composition due. The plaintiff also produced a witness to prove the payment of the composition money, for the land mentioned in the patent, in April 1800. The defendant objected both to the patent and parol evidence, as inadmissible and incompetent, because the patent was issued and obtained after the demise laid in the declaration, and after the action was commenced, and during its pendency. The court, [*Polk*, Ch. J. and *Robins*, A. J.] sustained the objection, being of opinion that the evidence was inadmissible and illegal, without the production of the certificate upon which the patent issued. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *BUCHANAN*, *NICHOLSON*, and *EARLE*, J.

*J. Bayly* and *Whittington*, for the Appellant.

*Martin*, *Wilson* and *W. B. Martin*, for the Appellee, cited *Peake's L. E.* 27, 28. *Spalding's Lessee vs. Reeder*, 1 *Harr. & M. Hen.* 187. *Hath's Lessee vs. Polk*, *Ib.* 363; and *Savory's Lessee vs. Whayland*, *Ib.* 206(a.)

JUDGMENT AFFIRMED.

(a) In this last case the action was brought to April term 1753, at which term the defendant appeared, and on the 11th of September 1753 he filed his plea.

DALE VS. FASSETT'S Lessee.

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DEC. (E. S.)

Dale  
vs  
Fassett

APPEAL from Worcester County Court. Ejectment for a tract of land called *The Conclusion of Morehuss*, otherwise called, &c. The defendant, (the now appellant,) took defence on the plots in the cause for a tract called *Red Land*.

1. At the trial the plaintiff offered evidence to prove the first boundary of *The Conclusion of Morehuss* to be at G, as located by him on the plots. And in order to prove title to the lands mentioned in the declaration, read in evidence a warrant of resurvey, obtained on the 5th of May 1747, by *Archibald Dale*, to resurvey a tract of land called *Morehuss*, stated to have been granted to *James Round* on the 18th of December 1683, for 200 acres.

Also a certificate of resurvey made in pursuance of that warrant, dated the 4th of November 1747, of a parcel of land called *The Conclusion of Morehuss*, "beginning at a marked red oak, first boundary of the aforesaid *Morehuss*, and from thence S E by S 260 poles," &c. containing 359 acres. Also a patent thereon granted to *Archibald Dale* on the 21st of March 1748. Also a deed from *Archibald Dale* to *Samuel Dale*, dated the 19th of May 1756, for 236 acres, part of *The Conclusion of Morehuss*, beginning the same "at a red oak, the first bounder of the original tract, and from thence," &c. Also a deed from *Samuel Dale* to *James Fussett*, dated the 16th of March 1768, for the same 236 acres, and described as in the deed from *Archibald Dale* to *Samuel Dale*, and also for a tract of land called *Chesnut Levell*, containing 46 acres; also a deed from *Archibald Dale* to *John Dale*, dated the 2d of August 1757, for 150 acres, part of a tract of land called *Red Land*. The defendant then read in evidence a patent granted to *James Round* on the 10th of May 1685, for a tract of land called *Red Land*, containing 300 acres. Also a patent granted to *John Dale*, senior, and *John Dale*, junior, on the 1st of June 1751, for a tract called *Red Land Enlarged*, containing 530 acres, being a resurvey

A bond, executed in 1759, by a person then claiming the land in dispute, jointly with another, conditioned to abide by a division which certain persons should make of the land, permitted to be read in evidence by the plaintiff in an action of ejectment, where the defendant claimed under the obligor in the bond.

In 1748 a tract of land called C was granted to A D, who in 1756 conveyed a part of that tract by courses and distances to S D. In 1757 A D being in possession of a tract called R, granted to J R, in 1683, conveyed a part of that tract by courses and distances to J D. Part of the land in the first mentioned deed was included in that part of the tract called R, which was conveyed to J D. In ejectment brought for the tract called C, there was proof of 60 years possession and upwards, by A D, S D, and the lessor of the plaintiff, of the land located by the plaintiff on the plot; also proof of upwards of 60 years possession by J D, and the defendant, of the tract called R, for which defence was taken—Held, that it is proved to the jury that the defendant, and those under whom he claims, held and claimed the

land in dispute under A D, from whom the conveyances were made in 1756 to S D, and in 1757 to J D, then there is competent legal proof to satisfy the jury that A D, at the time of making the conveyance to S D, had a good and sufficient legal title to the tracts of land called C and R, and that the jury may and ought to presume a deed or devise to A D for the same, or that he held the same by descent from the person having the legal right and title thereto.

The court refused to direct the jury, that if J D was in possession of that part of R, (for which the defendant took defence,) under A D, when a warrant to resurvey R was granted to J D and F D, and located by them, and for which they obtained a grant in 1751, and the said possession has been regularly transmitted from J D to the defendant, they ought to presume a deed for the said land from A D to J D, prior to the deed from A D to S D.

There being no competent legal evidence to prove, that upon a dispute between S D and J D, about their lines, they referred the same to arbitration, and a line was settled between them, the court refused to direct the jury that S D, and all claiming under him, are concluded by an agreement to arbitrate.

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of *Red Land*. The plaintiff then offered witnesses to prove to the jury, that all the land contained within the following limits, beginning at red E on the plots, thence with the green streak to red C, then to blue figure 2, thence to black C, thence to small letter n, thence to black I, thence to red X, red K and black B, and from thence to red E. designated on the plots, was uninclosed woodland, and includes the land in dispute. He also offered witnesses to prove, that all that part of *The Conclusion of Morehuss*, in the deed from *Samuel Dale* to *James Fassett*, the lessor of the plaintiff, as located on the plots by the plaintiff, was in possession of *Archibald Dale*, *Samuel Dale* and *James Fassett*, for 60 years and upwards; that *John Dale*, inspector, was the son of *Archibald Dale*, and that *John Dale*, inspector, was originally put into the possession of *Red Land* by his father, *Archibald Dale*, and that the said *John Dale* held the possession of the said land under his father, *Archibald Dale*, and by his permission. That the lessor of the plaintiff had claimed the land in dispute, and forewarned the defendant from cutting the timber. That about the year 1797, the lessor of the plaintiff had the land in dispute surveyed and run, according to courses and distances of the deed from *Samuel Dale* to him; that the pig pen, as located on the plots at figure 3, was put there by *Mitchell Gray*, who obtained permission for that purpose from the lessor of the plaintiff and the defendant. The defendant also offered witnesses to prove, that part of *Red Land*, for which he has taken defence, was in the possession of *John Dale*, junior, (inspector,) under whom the defendant claims, *Josiah Dale*, his son, and the defendant the son of *Josiah Dale*, for 60 years and upwards. He also read in evidence the will of *John Dale*, dated the 13th of December 1780, whereby he devised to his son *Josiah Dale*, in fee simple, "the manor plantation whereon I now live, with the improvements and appurtenances thereto belonging; that is to say, beginning at the boulder of *Red Land*, which is the first boulder of the land called *Second Addition*, so far as to come in range with the home line of my tract called *Welsh Tract*, and from thence running the reverse of the home line of *Welsh Tract* to the first boulder of *Welsh Tract*; and from thence, by and with the several lines of *Second Addition*, to the first boulder." Also the will of *Josiah*

*Dale*, dated the 14th of October 1794, devising to his son *John Dale* "all my lands and appurtenances which I own, where I now live, being part of *Second Addition, Stripe*, and part of *Powell's Purchase*, to him, his heirs and assigns, for ever." And offered evidence to prove, that the land, for which he hath taken defence, is the land described in the will of *John Dale*, and that *Josiah Dale* lived on part of the said land at the time of making his said will, and until his death. The plaintiff then, for the purpose of proving that *John Dale*, (inspector,) claimed under the deed to him from *Archibald Dale*, herein before mentioned, offered to read in evidence a paper, having first proved its execution, purporting to be a bond executed on the 24th of April 1759, by *John Dale*, (inspector,) to *John Dale*, senior, in the penalty of £500 current money, conditioned that the said *John Dale*, (inspector,) "shall and do, well and truly, stand to and abide by such determination and division as Col. *Joshua Mitchell*, Capt. *Adam Brevard*, and *Rouse Fasset*, shall make, of a tract of land called *Red Land*, situate," &c. "which said lands, by deeds of conveyance, became the rights of *Archibald Dale*, senior, and *John Pope*, and by deeds of conveyance became the rights of the above said parties *John Dale*, senior, and *John Dale*, inspector, so that such determination and division by the said *Mitchell*, *Brevard* and *Fasset*, stand good and be final on the same. Whose determination and division shall be ended by the first of June next ensuing the date aforesaid." To the reading of this paper the defendant objected. But the court, [*Folk*, Ch. J. and *Done*, A. J.] overruled the objection, and were of opinion that the paper was legal and proper evidence, and permitted it to be read to the jury. The defendant excepted.

2. The plaintiff then offered evidence to prove, that in September 1769, Col. *John Postly* and *William Stevenson*, were called on by *Samuel Dale* to ascertain the quantity of land contained in the deed to him from *Archibald Dale*, as located by the plaintiff; that they met on the land, and run from the boundaries of *Red Land*, and *The Conclusion of Morehuss*, for the purpose of connecting the tracts; and on plotting the same, found the two tracts to interfere with each other; that they found the deed from *Samuel Dale* to *James Fasset*, as located by the plaintiff, to contain 238½ acres and 14 perches; that they found to lie

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within the part of *Red Land*, for which the defendant takes defence,  $18\frac{1}{4}$  acres and 6 perches; also found 6 acres and 13 perches to lay within the part of *Red Land* located as *Thomas Dale's* part of *Red Land*, and that  $5\frac{3}{4}$  acres and 58 perches were taken away by a tract claimed by *Jesse Gray*, which, added together, amounted to  $8\frac{1}{4}$  acres and 14 poles, which deducted left 210 acres. They then added to that quantity the  $18\frac{1}{4}$  acres and 6 poles, which lay on that part of *Red Land* claimed by the defendant, and being added, made the quantity of  $228\frac{1}{4}$  acres and 6 perches, as being the quantity of land contained in the deed from *Samuel Dale* to *James Fassett*, as located by the plaintiff, after deducting the part taken away by the part of *Red Land* claimed by *Thomas Dale*, and the tract of *Jesse Gray*. The plaintiff then offered evidence to prove, that in the years 1790, 1793 and 1798, *James Fassett* was assessed and taxed with 228 acres of *Morehuss*. He also offered in evidence the certificate of survey of *Morehuss*, as located by the plaintiff, made for *James Round* on the 18th of December 1683, "beginning at a marked red oak standing on a high piece of land, thence," &c. containing 200 acres. Also evidence to prove, that *Archibald Dale* was in possession of *Red Land* previous to the deed from him to *Samuel Dale*, and at the time of the execution thereof; and that *John Dale*, inspector, before the date of the deed to him from *Archibald Dale*, was in possession of *Red Land*, by permission and with the consent of *Archibald Dale*. That the lessor of the plaintiff, in 1782, applied to counsel for advice respecting his right to that part of *The Conclusion of Morehuss*, which runs within the lines of *Red Land*, and was advised that he had a right to the same. That at the time when the road was reserved as located on the plots, *James Fassett* claimed a right to the land now in dispute, and said it was the disputable land; that this was about 6 years ago. He also proved, that *John Dale*, inspector, under whom the defendant claims, previous to the deed from *Archibald Dale* to him, acknowledged that he was in the possession of *Red Land* by permission of his father, *Archibald Dale*. The defendant then moved the court to direct the jury, that if they should be of opinion, from the evidence, that *Red Land* is correctly located by the defendant, and that that part for which he has taken defence has been in his possession, and the possession of

those under whom he claims, since the year 1760, that then the plaintiff is not entitled to recover, and that they must find a verdict for the defendant. This direction the court, [Polk, Ch. J. and Done, A. J.] refused to give; but were of opinion, and so directed the jury, that if it is proved to their satisfaction, that the defendant, and those under whom he claims, held and claimed the lands in dispute under *Archibald Dale*, from whom the conveyances were made in 1756 to *Samuel Dale*, and in 1757 to *John Dale*, inspector, that in that case there is competent legal proof to satisfy the jury that *Archibald Dale*, at the time of making the conveyance to *Samuel Dale*, had a good and sufficient legal title to the tracts of land called *The Conclusion of Morehuss and Red Land*; and that the jury may, and ought to presume a deed or devise to *Archibald Dale* for the same, or that he held the same by descent from the person having the legal right and title thereto. The defendant excepted.

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3. The defendant then moved the court to direct the jury, that if they should be of opinion, from the evidence, that *John Dale*, junior, was in the possession of that part of *Red Land*, for which the defendant has taken defence, at the time the warrant of resurvey for *Red Land Enlarged*, was granted and located, under *Archibald Dale*, and the said possession has been regularly transmitted from him to *John Dale*, the defendant, they ought to presume a deed for the said land from *Archibald Dale* to *John Dale*, junior, prior to the deed from him to *Samuel Dale*. This direction the court also refused to give. The defendant excepted.

4. The defendant then moved the court to direct the jury, that if they should be of opinion, from the evidence, that upon a dispute between *Samuel Dale* and *John Dale*, inspector, about their lines, they referred the same to arbitration, and that upon a settlement thereof by arbitrators, the line was settled from H to L on the plots, that *Samuel Dale*, and all claiming under him, are concluded thereby, and that therefore they must find a verdict for the defendant. But the court were of opinion, that there has been no competent legal evidence produced by the defendant to substantiate the facts alleged by him, and therefore refused to give this direction. The defendant excepted. The verdict and judgment being for the plaintiff, the defendant appealed to this court.

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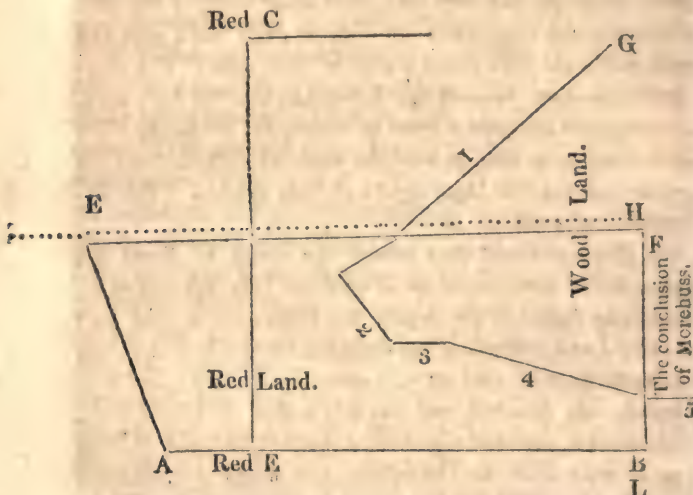
Adams  
vs  
Brereton

The cause was argued before BUCHANAN, NICHOLSON, GANTT, and EARLE, J. by

*Bullitt* and *W. B. Martin*, for the Appellant; and by *J. Bayly* and *Whittington*, for the Appellee.

**JUDGMENT AFFIRMED.**

The plaintiff located his claim and pretensions for *The Conclusion of Morehuss*, beginning at black G, the first bounder of the original tract, then with black lines and figures 1, 2, 3, 4, 5, &c. to G.



The defendant took defence for *Red Land*, beginning at black A, then to black B, F, E to A.

DEC. (E. S.)

ADAMS VS. BRERETON.

In an action of waste the plaintiff offered in evidence a writ of *ad quod damnum*, under which the defendant claimed, an injunction thereon, and a lease for 80 years, granted in pursuance thereof, for 20 acres of land, particularly described, as being

In an action of waste the plaintiff offered in evidence a writ of *ad quod damnum*, under which the defendant claimed, an inquisition thereon, and a lease for 80 years, granted in pursuance thereof, for 20 acres of land, particularly described, as being condemned for building a water mill, dated in 1763. He also proved, that the land described on the plots in the cause was, at the time of the execution of the writ of *ad quod damnum*, unimproved and covered with timber and other trees; and that the defendant applied the same to other purposes than to the use or support of the mill or houses: that he grubbed and cleared the land, and put it in cultivation, by planting corn;—*Heid*, that the plaintiff was not entitled to recover; that the defendant was not guilty of the waste complained of, but was justifiable, under the writ of *ad quod damnum*, and the grant made in virtue of the same, in clearing and cultivating the land.

particularly described as being condemned for building a water-mill, &c. dated the 12th of April 1763. The plaintiff then proved, that the land described on the plots in the cause was, at the time of the execution of the writ of *ad quod damnum*, unimproved, and covered with timber, and other trees, and that the defendant applied the same to other purposes than for the use or support of the mill or houses, or any thing thereunto appertaining; that he grubbed and cleared it, and put it in cultivation by planting corn and sowing wheat. On this evidence the defendant prayed the court to direct the jury, that the plaintiff ought not to recover, and that he, the defendant, was not guilty of waste, but was justifiable under the writ of *ad quod damnum*, and the grant made in pursuance of it, in clearing and using the land in the way as proved by the plaintiff. But the county court, [*Done and Robins, A. J.*] refused so to direct the jury, but on the contrary directed them that the plaintiff was entitled to recover; that the defendant was guilty of the waste complained of, and was not justifiable, under the writ of *ad quod damnum*, and the grant made by virtue of the same, in clearing and cultivating the land as aforesaid. The defendant excepted. Verdict and judgment for all that part of the land included within the letters, R, &c. wherein the waste and destruction was committed, &c. and £112 10 0 current money, damages assessed, and costs. The defendant appealed to this court.

The cause was argued at June term 1808, before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, J. by

*J. Bayly*, for the Appellant; and by

*Martin, W. B. Martin and Whittington*, for the Appellee.

JUDGMENT REVERSED.

### WOOD vs. REPOLD.

DECEMBER.

APPEAL from Baltimore County Court. This was an action of *assumpsit*. The declaration contained *two*

the drawer, can, in an action of *assumpsit*, recover against a prior endorser, the covered against him by, or by him paid to, the holder of the bill.

Such prior endorser, by his endorsement and delivery of the bill to the drawer, impliedly engaged to indemnify any person who should legally come to the possession of it, in case of default on the part of the drawer or drawee.

The endorsement, and delivery of the bill, by such prior endorser to the drawer, amounts, as to all subsequent parties, to an admission of a valid consideration; and such prior endorser cannot set up the want of a money consideration between himself and any subsequent endorser.

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A subsequent endorser of a bill of exchange, accounted for the accommodation of the whole amount re-

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counts, one on a bill of exchange drawn on the 6th of January 1802, by *Aquila Brown*, of *Baltimore*, on *Edward Goold*, and Son, of *New-York*, for \$3780, and payable 60 days after date to *Wood*, (the defendant, now appellant,) by the name of *Gabriel Wood*, & Co. or order, which bill was endorsed by *Wood*, by the name of *G. Wood* & Co. payable to the plaintiff, (*Repold*), and was, on the 10th of March 1802, presented to *Goold* and Son for payment, (the same having been accepted,) and payment being refused, the bill was on that day protested. The other count was for money laid out, expended and paid. The general issue was pleaded. The plaintiff at the trial gave in evidence that *Aquila Brown*, being a merchant, residing and carrying on commerce at *Baltimore*, did there draw the following bill of exchange on *Edward Goold*, and Son, of *New-York*, in favour of and payable to the defendant.

“*Baltimore*, January 6, 1802.

\$3780.

Sixty days after date pay to the order of Messrs. *G. Wood*, & Co. thirty-seven hundred and eighty dollars, value received, which charge to account of

*A. Brown*, Junr.

Messrs. *Edwd. Goold* & Son, *New-York*.”

Endorsed. “For value received pay the within to *George Repold*.

*Gabriel Wood*, & Co.

*George Repold*.

Accepted, *Edwd. Goold*, & Son.”

The plaintiff also gave in evidence, that this bill was made by *Brown* for the sole purpose of being discounted to raise money for his own use; that for enabling him to raise money on it, the defendant, at the request of *Brown*, and for the purpose of enabling him to raise money on the bill, and without any other consideration, endorsed the bill in blank, by the name of *Gabriel Wood* & Co. on the day of the date of the bill, and immediately delivered it back, so endorsed, to *Brown*, but had at that time no knowledge or information that it was to be endorsed after him by the plaintiff, or that *Brown* intended to apply to the plaintiff to endorse it. That *Brown*, after receiving back the bill, so endorsed by the defendant, carried it on the same day to the plaintiff, and requested him to endorse it

after the defendant, for the purpose of giving it further credit, and of thereby enabling *Brown* to raise money on it for his own use and benefit; that the plaintiff, in compliance with this request, and for the purpose of giving additional credit to the bill, and of thereby assisting *Brown* to obtain the money on it, did endorse it in blank, and immediately delivered it back, so endorsed, to *Brown*, who soon afterwards procured it to be discounted, for his own use and benefit, by the Bank of *Baltimore*. That at the time of these endorsements no communication had taken place between the plaintiff and defendant respecting the bill or endorsements, or respecting any endorsements to be made by them, or either of them, for *Brown*, or for his use or benefit; and that the plaintiff received no consideration for his endorsement, except such as might arise in law from the previous endorsement of the defendant, and from the making of the bill by *Brown*; and that the bill was never delivered to the plaintiff by *Brown* or the defendant, except for the purposes aforesaid. The plaintiff also gave in evidence, that the bill, having been discounted by the Bank of *Baltimore*, was duly presented by that bank to the drawees, for acceptance and payment, and not having been accepted or paid was by them duly and regularly protested for non-acceptance and non-payment, of which protests notice was duly and legally given by the said bank to *Brown*, and to the defendant and the plaintiff; that payment of the bill was then demanded immediately by the bank from *Brown*, who failed to pay it; whereupon notice of such failure was given by the bank to the plaintiff and the defendant, and payment of the bill thereupon was demanded of them by the bank. The plaintiff further gave in evidence, that he and the defendant, being so called on for payment of the bill, did agree that each of them should pay one half of the sum due thereon, but that the right of the plaintiff to recover from the defendant, as prior endorser of the bill, the sum so by the plaintiff to be paid, with interest, should not in any manner be affected by the said agreement; and that the plaintiff, in pursuance of the said agreement, did on the 20th of March 1802, pay to the bank the sum of \$1890, being one half of what was then due on the bill. The defendant then prayed the court to direct the jury, that the plaintiff, if the jury should believe the facts so

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offered in evidence by him, is not entitled in law to recover in this action the amount paid by the plaintiff to the bank. Which opinion the court, [*Nicholson Ch. J.*] refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at December term 1809, before CHASE, Ch. J. GANTT, and EARLE, J. and was reargued at the present term before CHASE, Ch. J. POLK, BUCHANAN, GANTT, and EARLE, J.

*Martin, Shaff, W. Dorsey, Winder, and S. Chase, jr.* for the Appellant, contended, 1. That as no consideration was given or paid by *Repold* to *Wood* for the bill of exchange, *Repold* was not entitled to recover in this action. 2. That *Wood* and *Repold* were to be considered as co-securities; and that where one surety paid, he might call on the other to become contributory, and as *Wood* paid one half of the bill, *Repold* was not entitled to recover the other half of him. In support of the first principle, they cited *Kyd on Bills*, 276. *Puget vs. Forbes & Gregory*, 1 *Esp. Rep.* 117. *Chitty on Bills*. 9, 50, 51, 181. *Evans's Ess.* 103, s. 2. *Imp. M. P.* 391, 392. *Wats. on Part.* 240. *Petrie vs. Hannay*, 3 *T. R.* 418, 421. *Ex Parte Lambert*, 13 *Ves.* 179. 1 *Com. on Cont.* 9 to 13. 1 *Esp. Dig.* 32. *Pillans vs. Van Mierop*, 3 *Burr.* 1671. *Mansell vs. Burridge*, 7 *T. R.* 550. *Cowley vs. Dunlop*, 7 *T. R.* 571. *Gorgerat vs. McCarly*, 2 *Dall. Rep.* 149. *Jeffries vs. Austin*, 1 *Str.* 674. *Pearson vs. Garrett*, 4 *Mod.* 242; and *Grant vs. Naylor*, 4 *Cranch*, 224.

3. The undertaking of the endorsors was, that if the drawer or acceptor did not pay the bill, then the endorsors, as sureties, were to see it paid. *Evans's Ess.* 51. 1 *Lutw.* 888.

4. It is law, as well as equity, that if one surety paid, he had remedy against the other for his contribution. *Rogers vs. Mackenzie*, 4 *Ves.* 755. 2 *Com. on Cont.* 186, 190. *Turner vs. Davies*, 2 *Esp. Rep.* 478. *Deering vs. The Earl of Winchelsea*, 2 *Bos. & Pull.* 270. *Cowell vs. Edwards*, *Ibid* 268. *Wright vs. Hunter*, 1 *East*, 20. *Child vs. Morley*, 8 *T. R.* 614. *Evans's Ess.* 51, 149. *Kyd on Bills*, 113, 114. *Master vs. Miller*, 4 *T. R.* 342; and *Pillans & Rose vs. Van Mierop & Hopkins*, 3 *Burr.* 1663.

5. Where bills are not negotiated in the regular course of trade, notice is not necessary, and the strict principle is not applicable to them. *De Berdt vs. Atkinson*, 2 H. Blk. Rep. 337, per Buller, J.

6. The declaration is defective, in not stating that *Repold* had entitled himself to recover by having taken up the bill. 1 Harr. Ent. 290.

*Key, Harper, T. Buchanan, J. Bayly, and Boyd*, for the Appellee, contended, 1. That the last endorser of a bill of exchange, by the law of merchants, can recover of his antecedent endorsers. They referred to 2 Com. Cont. 164, 188. *Rogers vs. Mackenzie*, 4 Ves 753. Sir F. Deering's case, 2 Bos. & Pull. 270. *Turner vs. Davies*, 2 Esp. Rep. 478. *Martindale's Lessee vs. Troupe*, 3 Harr. & M'Hen. 317, *Pinkney's* argument; and *Murray vs. Elibank*, 13 Ves. 8.

2. An accommodation bill of exchange is a mercantile transaction. They cited *French vs. Bank of Columbia*, 4 Cranch, 141, 156, 157. *Nicholson vs. Gouthit*, 2 H. Blk. Rep. 612. *Mallet vs. Thompson*, 5 Esp. Rep. 179. 1 Esp. Dig. 43, 46. *Simmonds vs. Parminter*, 1 Wils. 185. *Chitty on Bills*, 13; and *Encyclopedia*, tit. *Bills of Exchange*.

3. *Repold* and *Wood* were not joint sureties, and of course each of them was not bound to contribute one half, on the dishonour of the bill. They cited *Preston vs. Mercœur*, 2 W. Blk. Rep. 1249, 1250. *Toussaint vs. Martinant*, 2 T. R. 105. 2 Com. Cont. 174. *Peake's Evid.* 78. *Chitty on Bills*, 1, 2, 103, 112, 115, 116, 117, 118. *Peacocke vs. Rhodes*, Dougl. 636. *Russell vs. Langstaffe*, *Ibid* 516. *Heylen vs. Adamson*, 2 Burr. 674. *Smith vs. Knox*, 3 Esp. Rep. 48. *Smith vs. Clarke*, *Peake's N. P.* 225. *Parker vs. Kennedy*, 1 Bay's Rep. 416. *Nicholson vs. Gouthit*, 2 H. Blk. Rep. 612. *Atkins vs. Banwell*, 2 East, 506. *Seddons vs. Stratford*, *Peake's N. P.* 215; and *Kyd on Bills*, 89, 113.

4. The general position, that between the immediate parties to a bill of exchange the consideration may be gone into, is admitted; but the meaning of that general rule is not that the endorsee must have paid value to his proximate endorser. They cited *Russell vs. Langstaffe*, Dougl. 514. *Smith vs. Knox*, 3 Esp. Rep. 46, 47. *Mallet vs. Thomp-*

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son, 5 *Esp. Rep.* 179. *Scott vs. Lifford*, 1 *Campb.* 246. *Seddons vs. Stratford*, *Peake's N. P.* 215. *Bank of Columbia vs. French*, 4 *Cranch*, 141. 1 *Morg. Ess.* 41, 42. *Chitty on Bills*, 9, 51, 181, 185. *Evans's Ess.* 104, s 2, 103, s. 2. *Forth vs. Stanton*, 1 *Saund.* 211 b. *Puget vs. Forbes*, 1 *Esp. Rep.* 117. *Imp. M. P.* 391, 392. *Wals. on Part.* 244. *Ex Parte Lambert*, 13 *Ves.* 179; and 1 *Com. Cont.* 2, 9, 13, 16.

5. As to the equity of the case, they cited *Toussaint vs. Martinnant*, 2 *T. R.* 105. *Osborne vs. Rogers*, 1 *Saund.* 264, (notes.) *Underhill vs. Horwood*, 10 *Ves.* 226; and *Philips vs. Hunter*, 2 *H. Blk. Rep.* 412.

*Curia adv. vult.*

BUCHANAN, J. at this term delivered the opinion of the court (a). *Aquila Brown*, a merchant of *Baltimore*, wishing to raise a sum of money, drew a bill of exchange on a house in *New-York* for \$3780, in favour of *Gabriel Wood and Company*, at sixty days, and took it to *Wood*, who at his request, and without any consideration, but solely to enable him to raise money on the bill, endorsed it in blank, and returned it to *Brown*. *Brown* then took it to *Repold*, who also, at his request, but without consideration, and to give a further credit to the bill, endorsed it in blank, and delivered it back to *Brown*, who took it to the *Bank of Baltimore*, and got it discounted. No money consideration passed between *Repold* and *Wood*; there was no communication or understanding on the subject between them, nor had *Wood* any knowledge that *Repold* was to endorse after him. The bill was afterwards regularly protested for nonpayment. Whereupon, *Repold* paid one half of the amount to the *Bank of Baltimore*, and obtained possession of the bill, and then brought suit against *Wood*, as his endorser, to recover back the sum so paid by him to the bank. The declaration contains two counts, the first, the common count on a bill of exchange by an endorsee against an endorser; the other a money count for money laid out, expended and paid, for the use of *Wood*. It is objected that the plaintiff below is not entitled to recover, on two grounds—*First*. That he and *Wood*, by their endorsements, became co-securities for *Brown*, and was each to contribute his proportion. *Second*. That an endor-

(a) *Polk and Gantt*, J. concurred.

see cannot recover against his immediate endorser, unless a money consideration passes at the time of the endorsement; and that in this case no money consideration did pass, the endorsement by each being only to enable *Brown* to raise money on the bill. If *Repold* and *Wood* could be considered as standing in the relation of co-securities for *Brown*, the first objection would be fatal; for in the capacity of co-security, *Repold* could not recover on the first count in the declaration, but must rely upon the money count, and having paid but one half of the amount of the bill in question to the Bank of *Baltimore*, he could not, on the second count, recover back from *Wood* the sum so paid, being only what he himself, as a co-security, would be bound to contribute. But I am at a loss to imagine on what principle *Wood* and *Repold* are to be viewed in the light of co-securities. There is no doubt, that two or more may jointly endorse a bill of exchange; and in such case, each would be bound to contribute his just proportion of the amount; but then the endorsement itself must be joint, and not several and distinct, or at least, to create between two successive endorsers a liability to contribution, there must be a correspondent understanding between them. But here the endorsement does not purport to be joint, or bear in itself any evidence of a joint understanding between the endorsers, nor does there, in any manner, appear to have been any such understanding between them; on the contrary, when *Wood* endorsed the bill there had been no communication between him and *Repold*, and he did not know, or even suppose, that *Repold* was to endorse it after him, and I can perceive no resemblance between their relative situation, and that of co-securities in a bond. Every man who signs an instrument of writing, is considered as understanding the nature of the obligation or contract into which he enters, and by his signature, subjects himself to the operation of the law governing such instruments. If two or more persons become securities for another in a bond, the law imposes upon them a joint undertaking or liability; and if one pays the debt of the principal, he may recover from each of the co-securities his aliquot proportion of the sum paid; and in such transactions, it is not necessary, to constitute a co-securityship, that they should all execute the bond at the same time, or that there should be an understanding between them; the nature of the in-

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strument, and the law operating upon it, create the joint liability. Therefore, if one signs a bond, as security, at one time, not knowing who, or that any person is to come after him, and another signs it at a different time, *by operation of law* they are co-securities, and either who pays the whole, may call upon the other for his contribution. But not so with respect to the endorsors of a bill of exchange. Every endorsor is considered in law as a several and collateral security, and is as a drawer to his endorsee. An endorsement presupposes a consideration passing from the endorsee to the endorsor, and of necessity precludes the presumption of a joint undertaking; for the law is consistent, and both presumptions cannot stand together. But in the case of the securities in a bond, there is not only no presumption of any consideration moving from one security to the other, but the fact is directly contrary, and the very nature of the transaction excludes the idea. I cannot, therefore, entertain the first objection, but think, that the endorsements of *Wood* and *Repold* must be considered as several and successive, to be operated upon by the law regulating such transactions. Nor can I perceive that the second objection is better supported. The bill in question, though drawn and endorsed for the accommodation of the drawer, to enable him to raise money upon it, must be considered as if it had been made in the ordinary course of business, subject to all the law and incidents attending bills of exchange, endorsed and passed in a regular course of negotiation. The same principles of law, and the same rules of evidence, equally apply to both, and when so considered, the objection that *Wood* received no money consideration at the time of his endorsement, appears to me to have no weight. The position that, as between the immediate parties to a bill of exchange, as the drawer and acceptor, the payee and drawer, the endorsee and his immediate endorsor, the want of consideration is a sufficient defence to an action on the bill, is certainly a correct one, and extends to all bills of exchange, whether for accommodation, or otherwise. But that principle, when tested by the established practice and settled forms of proceedings in actions on bills of exchange, will, I think, be found applicable only to that particular stage of the negotiation at which the bill has stopped in the hands of the party suing, who having never passed it

away, has consequently been obliged to pay nothing upon it, nor has created any liability on himself to pay, and therefore can only recover, in virtue of a consideration passed by him to the party from whom he received it; and in such case, it is that consideration alone which gives him a right of action. And although the *law* supposes a consideration, and the plaintiff is under no necessity to prove one, yet if none did pass, it was a naked undertaking, of which the defendant may discharge himself at the trial, by showing a want of consideration, or that it was an illegal one; but the same principle does not apply to this, or any case of an endorser, or intermediate endorsee, who under his liability on his endorsement has been obliged to pay or take up the bill. If it did, there never could be a recovery on a bill of exchange by an endorser, or intermediate endorsee, against the drawer or immediate endorser; for every endorser, by his endorsement, discharges the preceding parties as to himself, and constitutes his endorsee the payee. No consideration, therefore, which he may have originally paid for the bill, can afford him a ground of action; for having parted with all his interest in it, he is presumed in law to have received a valuable consideration for it, and can have no right to the money a second time. He cannot then recover, in consideration of what he may have originally given for the bill; nor could he have an action on the bill, in consideration of payment by him in virtue of his endorsement, as such payment is not a consideration originally given for the bill, but must be subsequent, which is contrary to every day's experience; for no action is more common than that by an endorser against a drawer, or an intermediate endorsee against his endorser, in which the plaintiff can only recover, on proof of payment by him to the *bona fide* holder of the bill; which payment gives him a new title to receive the money from the antecedent party, and is the very foundation of the suit, and the consideration money between them, as immediate parties to the bill, is never made a subject of inquiry, and if proved, could not aid the plaintiff. How then can that be deemed necessary, to entitle a party to recover, which, if proved, can avail him nothing? And this shows that the principle, that as between the immediate parties to a bill of exchange the want of consideration is a sufficient defence, is only appli-

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cable where a payee or endorsee has never parted with the bill. In such case, if he has given nothing for it, he cannot be entitled to recover any thing upon it; and that it does not apply to any party to a bill, who, on its being protested, has been obliged to take it up; in which case it is not the consideration originally moving from him, which entitles him to recover, but it is the subsequent payment alone on which the law raises the promise, and gives him a new cause of action, and he sues in the capacity in which he paid the bill, and not that in which he received it. This application of the principle contended for, clears the case before us, I think, of all difficulty. The blank endorsement by *Wood* was an undertaking to pay the whole amount of the bill, if the acceptor or drawer should not, and it gave *Brown* authority to carry his credit into market, and to pledge it to all the world. On the faith of that pledge, *Repold* put his name on the bill, and thus incurred a liability, under which he has been obliged to pay one half of the amount of it to the Bank of *Baltimore*, where it was discounted; and it does not now lie in the mouth of *Wood* to say that he received nothing for it. *Wood*, by his endorsement, became liable for the whole amount of the bill, which liability was not in any manner lessened or impaired by *Repold's* endorsement, for the bank might have stricken out *Repold's* name, and recovered the amount from *Wood*. If then his liability was not extinguished by *Repold's* endorsement, what has since extinguished it? Surely not the payment by *Repold*, who certainly is entitled to indemnity from some of the antecedent parties. *Wood* was as a security, that if the acceptor or drawer should not pay the money, he would. They have both failed to pay it, and he, as their security, now stands responsible to *Repold* for so much as he has paid. But it is said, that as *Repold* was himself also a collateral security, the payment by him was only in discharge of his own pledge, and therefore gives him no cause of action against *Wood*; but that argument goes too far; for suppose *Wood* on his liability had paid the money to the bank, would it not equally have been in discharge of his pledge? And yet it will hardly be said, that he could not, in that case, have recovered in an action on the bill against *Brown*, (if he was solvent,)

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in consideration of such subsequent payment, though no money or other valuable consideration originally passed from him to *Brown*. And if *Wood*, on redeeming his pledge, could have sustained an action on the bill against *Brown*, on what principle is it, that *Repold*, having redeemed his, cannot sustain an action against *Wood*, who as to him, is the drawer of the bill, and to whom *Repold* stands in the same relation as he to *Brown*? And again, if a subsequent payment will give one immediate party a right of action on a bill of exchange against another, without any money consideration having originally passed between them, how can it be that the same principle does not extend to all? Nor is there any hardship in the case; *Wood* was bound for the whole of the money, and *Repold*, having paid a part of it, there is nothing unreasonable in his recovering it back again.

CHASE, Ch. J. As I do not concur in opinion with the court, respect and deference for their judgment, and what is due to myself, impel me to communicate the principles and reasons on which my dissent is grounded, and I have endeavoured to draw my opinion up in a plain and perspicuous manner, that my reasoning, and the principles and positions of mercantile law, on which it is founded, may be clearly discerned and understood.

A bill of exchange is assignable, and carries internal evidence of a consideration, in order to facilitate and strengthen that commercial intercourse which is carried on through its medium. The endorsement on a bill of exchange carries the same internal evidence of a consideration, and creates a liability or obligation to pay the money to the fair holder of it, who, after due diligence used, and the precautionary steps have been taken, can resort to the drawer or any of the endorsors, for payment of the money. All the endorsors are equally liable on their respective and several endorsements, and the holder can support an action against either, without regard to the order in which their names stand on the bill. Every endorsement is in the nature of a new bill. The consideration of a bill of exchange may be inquired into between the immediate parties to it, as between the drawer and payee, the drawer and acceptor, and the endorsee and his immediate endorser.

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As a bill of exchange, and the endorsement on it, carry with them internal or *prima facie* evidence of consideration, the *onus probandi* of the want of consideration is imposed on the defendant in both cases.

In this case it is admitted no consideration passed from *Repold* to *Wood*, as a motive or inducement for *Wood's* endorsement, except such as might arise in law from the previous endorsement of *Wood*. It is also stated, that *Wood* and *Repold* endorsed the said bill, at the request of *Aquila Brown*, to give credit to it, and to enable him to receive the money on it for his own use and benefit, and that at the time of said endorsement no communication had taken place between *Wood* and *Repold* respecting the said bill or endorsements, or respecting any endorsements to be made by them, or either of them.

This is a suit brought by the endorsee of a bill of exchange, against his immediate endorser, to recover the money paid by him to the Bank of *Baltimore*, and which he was compellable to pay.

It cannot make any difference in this case, as to the question of consideration, whether the bill is considered as an accommodation bill, or as passing in the ordinary course of mercantile transactions; the essential properties and qualities appertaining to bills of exchange attach to each, and the usual forms and requisites must be complied with to establish a right of recovery against the drawer and endorsors.

Every endorser of a bill of exchange becomes a collateral security, and by his endorsement engages to pay the money, if the drawer or acceptor does not.

The endorsement of a bill of exchange, *without* consideration, is a *nudum pactum*, as between the endorser and his immediate endorsee, and no action can be supported on it by such endorsee.

The endorsement of a bill of exchange creates a liability in favour of every fair or *bona fide* holder of it, and such liability results, by operation of law, from the nature of a bill of exchange, and therefore an inquiry into the consideration in such case is precluded. The inquiry into the consideration of a bill of exchange, or the endorsement, being confined to the immediate parties to it, cannot restrict the negotiability of the bill, nor can any evils flow from it.

The payment of the money to the bank by *Repold*, was certainly not any consideration moving from *Repold* to *Wood*; nor could any liability from *Wood* to *Repold* be created by it. The consideration must exist at the time of the endorsement. The money was paid by *Repold* to the bank, in consequence of his own endorsement, and thereby he acquired a right of action or remedy against *Brown*, the drawer, but not against *Wood*, because *Wood* had received no consideration for his endorsement. *Wood's* name being on the bill, although it might be an inducement with *Repold* to become an endorser, as the risk of his securityship might be diminished by it, was not, most assuredly, a request by *Wood* to *Repold* to become an endorser, nor could it, in law, render him liable to *Repold*.

To give validity to an endorsement, and make it operate as a transfer to the endorsee from his immediate endorser, there must be an existing consideration, at the time of the endorsement, of money, or something of the value of money, moving from the endorsee to the endorser. The priority of the endorsement, independent or exclusive of any other circumstance, cannot create any liability. If the endorsement of itself created a consideration, it would be conclusive evidence in all cases, and the principle of law, which allows of an inquiry into the consideration between the immediate parties, would be infringed, and become a nullity.

It is stated in the case, that no consideration was received by *Wood* from *Repold*, except such as might arise by operation of law from the previous endorsement.

It has been contended by the counsel of the appellee, that as *Wood* endorsed the bill at the request of *Brown*, and delivered it to him for the purpose of enabling him to procure money on it, that *Brown*, by implication of law, became the agent of *Wood*, to use all necessary means to obtain the money, and that the request of *Brown* to *Repold* to endorse the bill, was the request of *Wood*, and that the subsequent payment of the money by *Repold* to the Bank of *Baltimore*, coupled with the request, created a good and valid consideration.

There can be no doubt but that, by these acts of endorsement and delivery, the credit of *Wood* was pledged to any person who would pay money on it, and that *Wood* would have become liable to such person; but surely they

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could not constitute *Brown* the agent of *Wood*, or impart any authority to *Brown* to request *Repold*, or any other person, to endorse the bill. The full extent of *Wood*'s engagement was to be responsible to any person who would advance the money on his credit. An agent cannot be made by operation of law, and more especially when he is to do an act, in that capacity, for his sole and exclusive benefit.

The case stated excludes all agency to make a request, because it states there was no consideration but what might arise by operation of law from the prior endorsement, and also states, that *Repold* endorsed the bill at the request of *Brown*, and does not state that it was done at the request of *Brown*, as the agent of *Wood*.

Both the endorsors' names were on the bill before the bill was negotiated, and the discount was obtained; and they both signed for the express purpose of giving credit to the bill, and enabling the drawer to get the money on it. No money passed from *Repold* to *Wood*, nor any other consideration; they were both collateral securities for the drawer, that the drawee should pay the bill; on the failure of the drawee to pay the bill, and on the holders complying with the usual requisites, they became liable on their respective endorsements to pay the money to him. On the admission that *Repold* paid the money to the bank, he could have resorted to the drawer, but *Wood*, his immediate endorser, is not liable to pay the money to him, for want of consideration, and this on the supposition that it was a bill which had been transferred by *Wood* to *Repold* in the ordinary course of mercantile business, without consideration.

The payee of a bill of exchange cannot transfer it unless by a special endorsement, or an endorsement in blank, and delivery to the endorsee. In this case the endorsement by *Wood* was in blank, and the delivery was to *Brown*, and not to *Repold*; so that there was not any transfer from *Wood* to *Repold*. The bill came to the possession of *Repold* by delivery from *Brown*, not for the purpose of transferring it to him, but for the special purpose of his endorsing it to give it further or additional credit, and was, after endorsement by *Repold*, redelivered to *Brown*, for the sole purpose of enabling him to obtain money on it for his sole benefit. If a real bill, on what prin-

principle of law is it that the first endorser is legally responsible to the second without any transfer or consideration?

Considering it as an accommodation bill, (of which there can be no doubt,) and that as such, it has all the qualities and properties incident to a bill of exchange negotiated in the accustomed mercantile manner, what is there in this case to prevent the want of consideration from being a bar to the recovery? I think there is not any thing in this case to distinguish it from the common action of an endorsee against his immediate endorser, who endorsed without consideration.

As to the question of contribution on the ground of its being an accommodation bill: *Wood* and *Repold* are collateral securities; their names are on the same bill as endorsers, and they both signed prior to the obtaining the money by discount; they became securities for the drawer that the drawee would pay the money. It is not necessary that both securities should sign at the same time, one may sign one day, and the other on another day; nor is it necessary they should have a previous conference as to their intention of becoming securities, in order to render them liable to contribution. The liability to contribute results, as a consequence of law, from their having entered into the same engagement for the same person, and to do the same thing; the one having paid the whole money, it is on a principle of justice that the other is compellable to contribute his proportion. The action for contribution cannot be supported on the bill of exchange as such; but to entitle the party to a recovery it must specially set forth all the circumstances of the case as the ground of the action.

I can see nothing to distinguish this case from the common cases of securities on bonds and notes, the liability is similar, and the principle of justice is the same.

**EARLE, J.** The contending parties in this suit are the only endorsers of a bill of exchange, endorsed by each, at the request and for the accommodation of the drawer, to enable him to raise money for his own use and benefit; and the action is brought by the last against the first endorser, on the ground of his having paid the bill to a fair holder. The principal questions arising out of the case are:

Whether there is a consideration between the parties sufficient to maintain the action? And

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Whether a want of consideration is a defence that may be used against the present appellee?

As I agree with the chief judge on all the points he has touched in delivering his opinion, it seems unnecessary for me to give the result of my reflections upon any of them. I must, however, be allowed to make some short remarks on the two adjudged cases referred to in the argument, as decisive of the above questions.

The cases alluded to are those of *Seddons vs. Stratford*, and *Russell vs. Langstaffe*, neither of which, it appears to me, can be assimilated in circumstances or principles to the case before us.

The first is the case of an endorser, who endorsed for accommodation, and having paid the note to a fair holder rested his claim upon his payment; but his suit was not against his immediate endorser, nor did the defendant endorse solely to accommodate and raise money for another. The note was passed for premiums of insurance, and endorsed by *Stratford*, the payee, to *Clode*, who, as I understand the Reporter, endorsed to *Seddons*. The plaintiff and defendant being remote parties in the negotiation of the paper, between them the consideration could not be inquired into; and if they were immediate parties, the want of consideration was no defence for *Stratford*, because he had received value at the time of the endorsement—at all events he had not endorsed for accommodation. The situation of *Wood* in this transaction is far different. He endorsed immediately to *Repold*, and received value from no person; and it is therefore open to him to inquire into the subject of consideration, and show the total want of it.

*Russell vs. Langstaffe* resembles the case before us still less. The defendant had endorsed to raise money for another, and the plaintiff was his immediate endorsee, but *Russell* gave value for the note, and claiming merely as endorsee, founded his demand upon the money he had advanced to accommodate *Galley*. The money he advanced was the consideration he gave for the paper, and *Langstaffe* was not at liberty to defend on the ground that he had received no consideration when he endorsed, because he undertook to pay the note if *Galley* did not, to any person who would furnish the maker with the money. In no respect is the situation of *Repold* to be compared to that of *Russell*. He is endorser as well as endorsee; and in his

action insists on an act done by him as endorser. He did not give a consideration for the bill, but only paid to the person who did give a consideration for it; and instead of advancing to accommodate, he as a debtor, paid to fulfil his own engagement. His case is not within the contemplation of the understanding of *Wood* to pay to those who should advance for *Brown*, and it therefore seems to me, to be competent to *Wood* to show that there is no consideration between him and the appellee.

Not being able to discover how the payment of *Reppold* can be viewed as a consideration, and it appearing to me that the want of consideration may be shown between the parties to this action, it is my opinion that the court below erred in refusing to give to the jury the directions prayed for. I am for reversing the judgment.

JUDGMENT AFFIRMED.

OWINGS VS. REYNOLDS, *et al.* Lessee.

DECEMBER.

ERROR to the General Court. This was an action of ejectment for a tract of land called *Taylor's Forest*, lying in *Baltimore* county. The case as agreed upon, and submitted to the court, was this: *John Owings*, deceased, being seized in fee of the tract of land called *Taylor's Forest*, by his last will and testament, dated the 8th of February 1762, devised, (among other things,) as follow: "And as to what it has pleased God to bless me with, I dispose as follows," &c. "I give and bequeath to my son *Caleb Owings*, 60 acres of land, being part of a tract of land called *Taylor's Forest*, beginning," &c. "I give and bequeath to my loving wife, *Asenath Owings*, my dwelling plantation, and the remainder part of my part of *Taylor's Forest*, joining the said plantation, except the 60 acres willed to my son *Caleb*, to her during her natural life, and after her decease to fall to my son *Lot Owings*; and if he should die under age, its my will the said land should fall to my son *Caleb*, and my daughter *Asenath Odell*." *John Owings*,

J O, by his will, devised as follows: "I give and bequeath to my loving wife A O, my dwelling plantation, &c. to her during her natural life, and after her decease to fall to my son L O, and if he should die under age, its my will the said land should fall to my son C O, and my daughter A O." Held, that L O took only an estate for life.

F A, by his will, devised as follow: "I give and bequeath all the land that I am possessed of, to be equally divided between my two sons A and J, to them and their heirs, for ever; but if in case either of my said sons should die without any heir lawfully begotten of his body, or before he arrives to the age of 20 years, that he leaves and assigns for ever." "Item. Whereas I have given all my land to my two sons, my will is that the division here shall begin at," &c. "my son A to have the first choice of the land." "Item. my will and desire is, that my son A do, out of his part of my estate, expend so much money as will be sufficient to give my son J a good education;" and the testator appointed his son A his executor. A died above the age of 20 years, intestate, and without issue, leaving J his only brother, his heir at law. It seems to have been held by *Hanson*, Chan. that A took a fee simple under the devise. (Note)

Held by *Hanson*, Chan. that the following words in the last clause in the above will, viz "out of his part of my estate," be transposed so that the clause should read, "My will and desire is, that my son A do expend so much money as will be sufficient to give my son J a good education, out of his part of my estate." (Note)

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shortly after the execution of his will, died seized and possessed of the land therein mentioned. *Asenath Owings*, wife of *John Owings*, the testator, after her husband's death entered upon the land, and became possessed thereof, claiming the same under the devise, and occupied and possessed it until her death, which happened some time in the month of April 1792. *Lot Owings* named in the will, attained the age of 25 years, and died intestate in the year 1773, leaving the lessors of the plaintiff, *Rachel, Nancy, Sarah* and *Lot*, his heiresses at law, and who have intermarried with *Nicholas, Charles* and *John Reynolds*, and *John Peck*, the other lessors of the plaintiff. The defendant, *Caleb Owings*, is the same person named in the will of *John Owings*, to whom, and a certain *Asenath Odell*, the land was limited over by the will, in case *Lot Owings* should die under age; and *Caleb Owings*, the defendant, is the eldest son and heir at law of *John Owings*, the testator.

CHASE, Ch. J. The question submitted to the court in this case is, what estate is devised to *Lot Owings* by the will of his father *John Owings*, in the lands in question—an estate in fee simple or for life?

It is admitted that there are not any words of limitation or inheritance in this will superadded to the devise of *Lot Owings*; and also, that unless the testator has used words in his will indicating an intention to give a fee in the lands in controversy to *Lot Owings*, an estate for life only passed to him. But it is contended, the testator has used words in his will which, when the several parts of it are considered together, plainly import an intention to give a fee to *Lot Owings*; and three circumstances are principally relied on as indicative of such intention—1. The introductory clause—2. The limitation over to *Caleb Owings* and *Asenath Odell*, if *Lot Owings* died in his minority; and 3. There being no clause disposing of the residue.

It is established beyond controversy, that the intention of the testator is to prevail if not repugnant to some rule or principle of law; and that such intention is to be collected from the words of the will. That no technical words are necessary to create a fee. But the principle established by analogy to the rules prevailing in the limitation of estates by deed at common law is, that if law is given ge-

herally without adding words of limitation, an estate for life only passes; and this rule, though it often interferes with and defeats the intention of the testator, is so firmly settled, that no probable conjecture can shake it. As there are not any words appropriated in a will to the creation of a greater estate than for life, the courts, without infringing the above rule, have decided, that if it appears on consideration of the whole will, to be the plain intention to give a fee in the land, a fee passes. It is also an established rule in the construction of a will, that the heir at law is not to be disinherited unless by express words or necessary implication.

Having premised thus much, I will now consider those circumstances from which it is said a plain intention in the testator to give a fee to *Lot Owings*, is to be inferred.

Introductory clauses are in general mere form, and inserted without any particular or precise meaning being annexed to them; for almost every person who makes a will, sets down with an intention to dispose of his whole estate; and therefore they cannot have much influence—and only in favour of the clear intention of the testator. *Denn vs. Gaskin, Cowp.* 659, 660.

The introductory clause in this case, “as to what it has pleased God to bless me with,” can have no weight to induce the court to decide a fee passed to *Lot Owings*. It does not contain the word *estate*, nor any word of similar import, from whence an inference can be drawn, by coupling it with the clause in question, that the intention was to give a fee; and besides, there are no words to connect the devise of the land in question with the introduction, so as to pass the whole interest. *Denn vs. Gaskin, Cowp.* 660.

As to the limitation over, if *Lot* died in his minority. It appears to me, the meaning of the testator, to be collected from the words of his will, was that *Lot Owings* should have an estate for life, with a contingent remainder to *Caleb Owings* and *Asenath Odell* for their lives, on the contingency of *Lot Owings* dying in his minority. But if the contingency did not happen, there are no words to show *Lot's* estate was to be enlarged to a fee. If it could be implied, it is by no means a necessary implication, for the substitution was not to the heir at law, but to *Caleb Ow-*

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*ings and Asenath Odell. Fowler vs. Blackwell, 1 Com. Rep. 353.*

*Caleb Owings* is the heir at law who is entitled to that part of the real estate which is not disposed of; and the heir at law is not to be disinherited unless by express words or necessary implication. *Gascoign vs. Barker, 3 Atk. 10. 2 Ba. Ab. 66, 81. Byas vs. Byas, 2 Ves. 164, 165.*

Nothing can be inferred from the testator's not disposing of the residue.

In order to make a devise of lands, *without any limitation* added, a fee, such an intention must appear as is sufficient to satisfy the conscience of the court in pronouncing it such; if it is barely problematical, the rule of law must take place. *Roe vs Blackett, Cowp. 240..*

DUVALL and DONE, J. were of opinion, that *Lot Owings* took a fee, and judgment was consequently entered on the case stated, for the plaintiff, and the defendant brought the present writ of error.

The cause was argued before POLK, BUCHANAN, and GANTT, J.

*Ridgely, T. Buchanan* and *Harper*, for the plaintiff in error, cited *Frogmorton vs. Holyday, 3 Burr. 1618*; and *Tomkins vs. Tomkins*, cited in *1 Burr. 234.*

*Johnson*, (Attorney General) for the defendant in error, referred to *Brogden vs. Walker's Ex'r. &c. 2 Harr. & Johns. 285*, and *Chew's Lessee vs. Weems, 1 Harr. & M'-Hen. 463. S. C. 2 Harr. & Johns. 173, (note.)* He also referred to the case of *Frazier's creditors vs. Frazier's heirs*, in the court of chancery, (*a.*)

THE COURT reversed the judgment of the General Court.

GANTT, J. gave no opinion.

JUDGMENT REVERSED.

(*a.*) In the case of *Frazier's creditors vs. Frazier's heirs*, a bill was filed by the creditors of *Alexander Frazier*, for the sale of his real estate, for the payment of his debts. The answer of *John Alexander Frazier*, an infant defendant, by his guardian, among other things stated, that *Alexander Frazier* died in June 1790, above the age of twenty years, intestate, and without leaving issue, leaving the said *J. A. Frazier*, his only brother, his heir at law. That the father of *Alexander* and *J. A. Frazier*, by his will dated the 18th of March 1777, devised among other things as follow, viz. "I give

and bequeath all the land that I am possessed of to be equally divided between my two sons, *Alexander* and *John Alexander*, to them and their heirs, for ever; but if in case either of my said sons should die without any heir lawfully begotten of his body, or before he arrives to the age of twenty years, that then in such case his part to be the sole right and property of my surviving son, his heirs and assigns, for ever." "Item. Whereas I have given all my land, to my two sons, my will is that the division line shall begin at *Ruke's* land, and so running towards *Fishing creek*. My son *Alexander* to have the first choice of the land." "Item. My will and desire is, that my son *Alexander* do, out of his part of my estate, expend so much money as will be sufficient to give my son *John Alexander* a good education." By the will the testator appointed his son *Alexander* his executor. It was submitted to the chancellor to determine what estate passed to *Alexander* under this devise. It does not appear from the papers in the case that the chancellor decided what estate *Alexander* took under the devise. In November 1795, an agreement was entered into by the counsel of the parties, in which it is stated that *Alexander*, under the will of his father, had the right of election as to which part of the land he would choose; and it being doubtful whether any election was made by him, and also doubtful whether the court of chancery could determine the fact of election, for the prevention of controversy in future, it was agreed that the chancellor, with the consent of parties, should decree a sale of the whole of the lands devised, &c. the proceeds of the land to be equally divided between the creditors of *Alexander* and the defendant, each one half. The chancellor decreed accordingly. A sale having been made, *J. A. Frazier* exhibited an account, in which, amongst other matters, he charged the deceased as follows, viz:

"To a charge on the estate for default of expending money in the education of *John Alexander Frazier*, as directed by the will of *Alexander Frazier*, (the father,) deceased, say 8 years at £40 per year, £320 0 0."

HANSON, Chancellor, (August 1799.) This charge is founded on the claimant's construction of his father's will. Now supposing it the intent of the will to charge *Alexander* with his brother's education and maintenance, the strangest words imaginable are used. It is not "I give *Alexander* one half of my estate on condition that he lay out the sum of—in the complete education and maintenance of his brother at some approved school," or, "I will that the part of my estate devised to *Alexander* be charged with the expense of providing a good education to his brother, and likewise completely maintaining him at some approved school." No! it is, "my will and devise is, that my son *Alexander*, do, out of his part of the estate, expend so much money as will be sufficient to give my son *John Alexander* a good education."

It is apparent from the whole will, (setting aside this disputed part,) that the testator contemplated perfect equality between his two sons, except that he gives *Alexander*, the elder, the choice of two equal parts, and makes him executor; which is just what was reasonable, &c.

Now, by changing the disposition of the words, and putting "out of his part of the estate," at the end of the clause, it stands perfectly consistent with that intended equality, and it is well observed by counsel, that transpositions are frequently made for the purpose of supporting a rational construction of the whole. It may be observed, that there are few men, who, in speaking or writing do not express themselves in such a manner, that if you understand them, according to the strict rules of grammar, you make them speak contrary to their intention.

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It is alleged, without proof, that *Alexander* was burthened with the education of his brother, on account of his (the said *Alexander's*) having already received a good education; and that by so charging him, equality was preserved. But it is not so. In such a case, the eldest son would be educated at the charge of the whole estate, and the younger at the charge of the elder's part.

For illustration, suppose the whole estate to be £4000, and that £500 had been expended in educating *Alexander*, more than had been expended on *John*. To make them equal it ought to be directed that £500 shall be expended on *John*, and the residue divided between them. In that case, they will have been educated at equal expense, and the share of each will be £1750. But according to the construction contended for, they will have been educated at equal expense, and *John* will get £500 more than his brother; that is, they each share £2000 out of the £4000, *John* has his part clear; but £500 is taken from *Alexander* to educate and maintain *John*. When the contemplation of equality is so apparent, when an easy obvious transposition will support that equality, and when, without the transposition, such inequality takes place, it is impossible to admit the claimant's construction of the will.

"My will and desire is, that my son *Alexander*, out of his part of the estate, shall expend so much money," &c. as already has been observed, is strange language to constitute a charge on *Alexander's* part. "My will and desire," are words very significant. "To expend so much money," are equally so. In short, the meaning of the whole clause was, that *Alexander*, the executor, should be authorised to lay out as much of *John's* part of the personal estate, as would suffice to give him a liberal education; without this provision in the will, *John's* education might be defective. The guardian, whom he might choose, or who might be appointed without the provision, might not think proper to expend so much money as might suffice, particularly if the annual profits should not correspond with the proofs in this cause, or might happen in some year to fall short.

In addition to all this—supposing us compelled to take *his* for *Alexander's*, it may be asked, whether good education *must* comprehend maintenance; or whether, to prevent the great inequality in favour of a younger son, education might not mean barely the price of tuition, books, &c? Lodging, food and clothing, must be had, whether at school or at home; and therefore it might be said, that he who is charged with education is not of course charged with those articles of necessity.

In construing a will, it is notorious that the judges have never considered the question as a mere point of grammar. The question ever is, "what was the intent of the testator," to be collected from the whole of his words. Amongst grammarians there is no doubt that *his* is considered in propriety as referring to the antecedent, if there be one, and not to a subsequent. It may indeed, in this case, be contended that the testator was not aware of any antecedent, or any rule of grammar. It is probable that he was no grammarian.

Let it just be supposed that he had appointed *two* executors, and had said "my will and desire is, that *my* executors, (instead of saying *my son Alexander*,) do, out of *his* part of my estate, expend," &c. is there even a rigid grammarian who would say, that the testator violated the rules of grammar. No! he would say, "*his*" refers to the antecedent, if there be one, but the word "*his*" may well be placed so as to refer to a subsequent, as is the case of Mr. *Frazier* directing his two executors, out of his part of the estate, to educate his son *John Alexander*.

On the whole, from the fullest investigation of this case, and on full deliberation, it does not appear to the chancellor that *John Alexander Frazier* hath any just claim against the estate of *Alexander Frazier*.

## HANNAN VS. TOWERS.

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DECEMBER.

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APPEAL from a decree of the Court of Chancery. The bill, filed by the present appellee, stated that she is the sister of the defendant, *Hannan*, (now appellant,) and before her intermarriage with *J. Towers*, who is now dead, lived with the defendant for several years, and rendered him valuable services by attending to his family concerns, and superintending his domestic affairs. That in 1792 she intermarried with *J. Towers*. That the defendant, with a view of remunerating her for her services, agreed to grant and convey to her husband and herself, for their lives, a lot and dwelling-house in the city of *Baltimore*, situate in *Albemarle-street*, being part of lot number 326, and in evidence of the contract, executed and delivered the following instrument of writing, viz. "To all people to whom these presents shall come, greeting. *John Hannan* do send greeting. Know ye, that I the said *John Hannan*, of *Baltimore-town*, in the state of *Maryland*, do give and grant unto *John* and *Eliza Towers*, a dwelling-house and lot in *Albemarle-street*, being part of lot number three hundred and twenty-six, containing twenty feet in front and forty feet in depth, of which, before the signing of these presents, I have delivered to *Eliza Towers* an inventory signed with my own hand, and bearing even date. To have and to hold the said premises, or dwelling-house, during the lives of the said *John* and *Eliza Towers*, from henceforth absolutely, without any manner of condition. In witness whereof I have hereunto set my hand and seal this fourth day of June, in the year of our Lord one thousand seven hundred and ninety-three,

Signed, sealed and delivered, in

the presence of *James Hannan*, } *John Hannan*, [L. S.]  
*Michael Hannan* }

The bill also stated, that the defendant, in pursuance of the contract, put *J. Towers*, and the complainant his wife, in possession of the house and lot. That they expended a considerable sum of money in repairing and enlarging the house, by adding another story to it. That they continued in possession until the death of *J. Towers*, and the complainant continued in possession until 1800. That in 1797, after the death of *J. Towers*, the defendant brought an ejectment against the complainant for the house

Where a grant being made to J. T. and E. his wife, of a lot of ground, to have and to hold the said premises during the lives of the said J. and E. T.—Held, that a joint estate vested in them during their lives; and that the quality of survivorship being incident to a joint estate, or joint tenancy, without any technical or other words being necessary to confer that quality, the whole devolved on E., the survivor, during her life.

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and lot, and obtained judgment, and in 1800 executed a writ of possession, and turned the complainant out of possession of the house and lot, and still holds the same, and appropriates the profits to his own use and benefit. *Prayer*, to be reinstated in possession, and that the defendant account for the profits thereof, and convey unto the complainant a legal estate in the premises for her life, and for other relief, &c. The *answer* of the defendant states, that the instrument of writing was wholly voluntary and gratuitous, and without any consideration. That some time after the marriage of the complainant with *Towers*, who was a sea faring man, &c. he was prevailed upon, in order to give him the appearance of a permanent residence in *Baltimore*, and thereby give him a greater probability of getting employ from that port, to put him in possession of the house, and did give him some written instrument, but whether the same refers to the complainant he knows not, because the same, though referred to in the bill, is not exhibited, &c. He denies any contract which can give her any interest in the property, but if there be one it must be produced and proved. Commissions issued, and testimony was taken and returned, and the case argued and submitted to the chancellor.

KILTY, Chancellor, (27th of April 1807.) The object of the bill is to compel the defendant to convey to the complainant a legal estate in the lot therein mentioned, which had been conveyed to her, and her husband, who is since dead, by the instrument of writing exhibited. One of the grounds of defence is, that the above deed, if it had been acknowledged and recorded, would have been a lease for their joint lives, and that the estate would have ceased upon the death of either, on account of there being no words of survivorship. The chancellor considers it a sufficient reason to induce him to request the opinion of the chief judge of the third judicial district, as provided for by law. He therefore requests judge *Chase* to express in writing his opinion, whether the above deed, if it had been acknowledged and recorded according to law, would have created an estate on the joint lives of *John* and *Eliza Towers*, which would have ceased upon the death of either on account of their being no words of survivorship? Or, whether it would have created an estate in joint tenancy, which would have sur-

vived to the longest liver, and of course whether *Eliza Towers*, (no severance of the joint tenancy appearing,) would on the death of the said *John Towers* be entitled to the said lot for her life?

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CHASE, Ch. J. gave the following opinion in writing: The grant being unto *John* and *Eliza Towers*, to have and to hold the premises or dwelling-house during the lives of the said *John* and *Eliza Towers*, I am of opinion, that a joint estate vested in *John* and *Eliza Towers* during their lives, and the quality of survivorship being incident to a joint estate, or joint tenancy, without any technical or other words being necessary to confer that quality. I am also of opinion, that the whole devolved on the survivor during her life, according to the case as stated by the honourable chancellor.

*Kitty*. Chancellor. This point being thus determined by the chief judge, which, if the law had been otherwise would have made an end of the case, the other points are to be considered. The chancellor has examined the case, and the result of his examination is, that the complainant is entitled to the relief which she prays.

The remaining ground of defence set up by the answer is, that the instrument of writing, given to the complainant, was wholly voluntary and gratuitous, and without any consideration.

It is certainly laid down as a principle, that a court of equity does not decree specifically without a consideration, or that it will not carry into execution a voluntary deed without either a valuable or meritorious consideration. It will not be necessary in the present case to depart from this principle, however questionable it may be, when applied to instruments solemnly executed and delivered; but an inquiry into the grounds of it may not be improper.

The maxim of the civil law, *quod ex nudo pacto non oritur actio*, has given rise to the principle above stated, and to the position in support of it, that putting a *nude* contract into writing, even when under seal, will not supply the want of consideration, which is stated by *Powell* to be an essential defect in a contract by the civil law. But in the opinion given by Justice *Wilmot*, in *Pillans vs. Meierop*, 3 Burr. 1670, (tho' contradicted by the judges in the case of *Rann and Hughes*,) he stated, that "there was no

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radical defect in the contract for want of consideration, but it was made requisite, in order to put people upon attention and reflection, and therefore, if by stipulation or writing, it was good without consideration." The reasoning of *Powell* to the contrary does not appear satisfactory. It is, that "when the maxim was adopted and received into our system, it was accepted in its full extent; our law not recognizing any ceremonies analogous to a stipulation, which seems to have been, not the creation, but the ratification of a promise or contract in form before a magistrate." But inasmuch as the putting a contract into writing, with the sealing and delivery, are stronger evidence of deliberation than the stipulation of the civil law, it would seem reasonable to give to those solemnities the same effect of preventing contracts from being made, and without consideration; and the words cited by Justice *Wilmot* from *Plowden* are to this effect—"The delivery of the deed is a ceremony in law signifying fully his good will that the thing in the deed should pass from him who made the deed to the other." *Powell*, in reply to the observation of *Blackstone*, "that the rule as to *nudum pactum* does not hold in some cases, where a promise is authentically proved by written documents, as of a voluntary bond or note of hand," remarks, that "the former turns on the ground that it is an instrument under seal and delivered, which binds the parties, and alters the property, though there be no consideration;" that "the latter is of a distinct species; and that as long as a note of hand is confined to the parties who fabricate it, the want of consideration is a clear bar to recovering any thing upon it, upon the ground that it is *nudum pactum*." But the law only permits the defendant, (not being estopped by deed,) to inquire into the consideration of the note, and the burthen of proof lies on him, and not on the plaintiff, the note being *prima facie* evidence of his claim. *Powell*, in the preceding part of the same chapter observes, that "where a contract or agreement is by deed, the cause or consideration is not inquirable into in an action upon it; for every deed importing in itself a consideration, namely, the will of him who made it, a contract or agreement; where either of them is by deed, is never considered as *nudum pactum*." It appears to be strange, that whilst courts of law not only give their validity to sealed instruments, but in every possible case exercise an equitable

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jurisdiction for the attainment of justice, courts of equity should be studious to find cases in which they may avoid giving relief. Admitting it to be discretionary with courts of equity to decree the specific performance of agreements, yet they ought to pay that deference to the solemnity of deeds, as to intend them the acts of reasonable men, and arising from a good consideration, unless the contrary be proved. And where no consideration on the face of the deed, it should not on that account be deemed merely voluntary; but it should be incumbent on the grantor to prove any circumstances of fraud, unreasonableness or surprise, in order to show that a specific performance would be unjust.

But the present case, (in addition to the important circumstance of its being against the grantor himself, and there being no creditor, or other person concerned,) is not a bare voluntary agreement without a consideration expressed or implied. And the chancellor considers the following as established principles, to wit: That a consideration may be averred and resorted to without being expressed in the deed; and that to avoid the rule, it has been laid down, that any consideration, however small, will be sufficient, a court of equity being willing to lay hold of any just ground to uphold an agreement.

There is in the first place a *good* consideration as against the defendant, or even his heirs, if he was not living—that of blood or natural love and affection, which, though not expressed in the deed, appears to have existed, from the bill, the answer and the evidence, the complainant being the defendant's sister. The service rendered to him by the complainant as a house-keeper, as proved by the depositions, without a strict examination of the value of it, is a *valuable* consideration, so far at least as to come in aid of this deed; and even the reason assigned by the defendant himself, to wit, the giving Captain Towers the appearance of a permanent residence, and thereby giving him a greater probability of getting employ, may (as tending to his sister's support,) be viewed as a sufficient consideration to show that the deed was not merely voluntary, and may also show, what indeed is sufficiently manifest without it, that there was no fraud or surprise on the defendant in obtaining the deed. After the usual expressions in the grant, it contains the following: "of which, before signing,

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I have delivered to *Eliza Towers* an inventory, signed with my own hand, and bearing even date." And it appears that possession was given and held until the complainant, after the death of her husband, was turned out of possession, in consequence of the judgment in the ejectment; and this possession would have been sufficient to take the case out of the statute of frauds, if the agreement or lease had been by parol, and to oblige the defendant to execute a lease accordingly.

With regard to the improvements, it is believed that those which are proved in this case would have been sufficient to procure a decree for a lease if they had been made only on a promise of one, and this on the ground, that the lease was in part executed, and that the lessor should not take advantage of his own fraud to run away with the improvements made by another. And *a fortiori*, they ought to be considered in favour of the complainant, when made after the execution of the lease, and after possession under it, and not only with the knowledge of the defendant, but by his labour as a workman employed by the grantee, Captain *Towers*.

From the opinion of the chief judge of the third judicial district, it follows, that the title of the surviving lessee is equal to that held by both, and therefore, if the defendant is now right in his pretensions, he might at any time have brought his ejectment, and have taken possession as soon as the improvements were made. Captain *Towers* might have ceased to sail from the port of *Baltimore*, if he had continued alive, and thereby have furnished a pretence as solid as the one now set up. But no person is at liberty so to release himself from his engagements; and in a case less strong than the present, (*Villers vs. Beaumont*, 1 *Ver-non*, 100,) the chancellor uses these expressions: "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself; but he must lie down under his own folly; for if you would relieve in such a case, you must consequently establish this proposition, viz. That a man can make no voluntary disposition of his estate but by will, which would be absurd."

If the principles of equity herein stated are (as the chancellor supposes,) sufficient to bear out the complainant,

there can be no apprehension of hardship on the defendant, on considering the nature of the claim, and the defence set up, which is not of a nature to be countenanced by this court. *Decreed*, as to that part of the bill praying for a conveyance, that the defendant do, by a good and sufficient deed, executed, delivered and acknowledged, according to law, convey to the complainant the premises in the proceedings mentioned, to wit, &c. with all and singular the appurtenances and privileges thereto belonging. To have and to hold the same from the day of the date of this decree, for and during the term of the natural life of the complainant. *Decreed* also, that the complainant have the possession of the house and lot with, &c. Also *Decreed*, as to the part of the bill praying for an account, that the defendant account with the complainant for the rents and profits of the lot, during the time of his possession thereof under the judgment in the ejectment; and that an account be taken by the auditor, &c. From this decree the defendant appealed to this court.

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The cause was argued before POLK, BUCHANAN, and GANTT, J.

*Martin*, for the Appellant, contended, that the contract ceased on the death of *John Towers*; and if it did not, that being a voluntary contract, a court of equity could not enforce it. That the contract was made to a man and his wife, and there were no words of survivorship; and it was clear that there was no survivorship in the case of a grant to a man and his wife, as they could not hold as joint tenants. He cited 3 *Bac. Ab. tit. Joint Tenants and Tenants in Common*, (G) 685, (J) 691:

*Johnson*, (Attorney General,) and *W. Dorsey*, for the Appellee, cited *Co. Litt.* 180, a, s. 277. *Ibid* 182, a, s. 283. *Ibid* 113, a, (note.) *Ibid* 181, b. 2 *Blk. Com.* 180, 181; and *Pow. on Dev.* 303.

DECREE AFFIRMED.

POLK, J. dissented.

1810.

DAVIS VS. THE STATE.

DECEMBER.

Davis  
vs  
The State

ERROR to the Court of Oyer and Terminer, &c. for *Baltimore* county. An indictment was found at September term 1810, for assaulting, and attempting to commit *Sodomy*, on the body of W C. The indictment contained

An assault, with intent to commit the crime of *sodomy*, is within the act of 1793, *ch. 87*, and is thereby punishable.

As the judgment may be either at common law, or under the act of assembly, the conclusion in the indictment, *contra formam statuti*, is not improper.

The crime of *sodomy* is too well known to be misunderstood, and too disgusting to be defined farther than by merely naming it; it is unnecessary therefore to lay the *coram liter cognovit* in the indictment.

The court of oyer and terminer, &c. for *Baltimore* county, have an undoubted power to order the record of proceedings on an indictment, to be transmitted to the adjoining county court, the party charged having previously complied with the directions of the act of 1805, *ch. 55*.

The criminal court of *Baltimore* county, altho' designated the court of oyer and terminer, &c. must be considered as a branch of *Baltimore* county court, exercising criminal jurisdiction only, which is invested in all the other county courts.

Neither party can appeal from the decision of the court on an application for a removal of the suit to another county court.

Where an offence is punishable either at common law, or under an act of assembly, and the common law judgment is entered, but is stated to be according to the act of assembly—*Held*, that the unmeaning expressions that follow the judgment of the court, are to be rejected as surplusage.

As to the punctuation of the *tenth* section of the act of 1793, *ch. 57*.

two counts. The *first* count stated, that *Davis*, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on, &c. with force and arms at, &c. in and upon one W C, a youth of the age of 19 years, in the peace of God, and of the state of *Maryland*, then and there being, did make an assault, and him the said W C, then and there did beat, wound, and ill-treat, with an intent that most horrid and detestable crime, (among christians not to be named,) called *Sodomy*, with him the said W C, and against the order of nature, then and there feloniously, wickedly and devilishly, to commit and do, to the great displeasure of Almighty God, contrary to the act of assembly in such case made and provided, and against the peace, government, and dignity of the state. The *second* count stated, that the said *Davis*, not having the fear of God, &c. but being moved, &c. on, &c. with force and arms, &c. in and upon the said W C, in the peace of God, &c. then and there being, did make an assault, and him the said W C then and there did beat, &c. with an intent then and there feloniously, &c. with him the said W C, against the order of nature, to have a venereal affair, and with him the said W C, that sodomitical, detestable, and abominable sin, (among christians not to be named,) called *Buggery*, then and there feloniously, &c. and against the order of nature, to perpetrate and commit, to the great displeasure of Almighty God, and disgrace of all human kind, contrary to the act of assembly in such case made and provided, and against the peace, government, and dignity of the state. The traverser having appeared, filed a suggestion, on oath, that he could not have a fair and impartial trial in the court of oyer and terminer, &c. and prayed the court to order and direct the record of the proceedings to be transmitted to the judges of an adjoining county court, there to be tried, &c. This prayer the court refused. The traverser having pleaded not guilty, the case was tried, and a verdict of guilty was found against him. His counsel moved the court in

arrest of judgment, for the following reasons: 1. That the indictment concludes against the act of assembly, which makes the facts charged in the indictment criminal, or which forbids it. 2. That the facts charged in the indictment, as there charged, is no offence indictable by the laws of this state. 3. That the indictment is insufficient, inasmuch as it does not charge the traverser with an intent to have carnal knowledge of the body of W C. 4. That the indictment is insufficient wholly to authorise the court to pass judgment on against the party. The court, (*Scott*, Ch. J.) overruled the motion, and rendered judgment on the verdict, that the traverser should be imprisoned in the gaol of *Baltimore* county, from the 9th of January 1811, until the 9th of April 1811, and that he stand in the pillory on the third Saturday of January, being the 19th day of the said month, in the year 1811, for the space of fifteen minutes, between the hours of 12 and 1 o'clock of the same day, and that he also pay to the state the sum of \$500, for his fine laid upon him for the offence aforesaid, according to the act of assembly in such case made and provided, and that he be committed to prison until he pays the said fine, &c. To reverse that judgment the traverser brought the present writ of error,

1810.

*Davis*  
vs  
The State

The cause was argued in this court before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, J.

*Winder* and *Brice*, for the Plaintiff in error, contended,

1. That the cause should have been removed to an adjoining county court on the motion, &c. of the traverser. They referred to the acts of 1799, *ch.* 58, s. 1; 1804, *ch.* 55, s. 3; and 1805, *ch.* 65, s. 49, s. 25.

2. That the indictment was founded on the act of 1793, *ch.* 57, when no such crime as that charged in the indictment, is prohibited by that act. They referred to *Stubb's Cr. C. C.* 108, 109, 110. 2 *Hawk.* 35, 45, 76; and *Hale*, 170, 171.

3. That admitting it to be an offence, it was not sufficiently set out in the indictment. 1 *East's C. L.* 480, *Stubb's Cr. C. C.* 202, 203. 12 *Coke*, 36, 37; and 1 *Hale*, 628.

5. That the judgment was entered as an offence against the act of assembly.

1810.

Davis  
vs  
The State

*Johnson*, (Attorney General,) for the state, contended, that it was discretionary with the court, under the acts of assembly, to remove the cause or not; and having decided that the cause should not be removed, no appeal lies therefrom. He referred to the act of 1805, *ch. 65, s. 49*. Upon the other questions he referred to the act of 1793, *ch. 57, s. 10*. *Stubb's Cr. C. C. 140*; and *East's C. L. 448*.

*EARLE, J.* delivered the opinion of the court. The court are of opinion, that an assault, with an intent to commit the crime charged in this case, is within the act of 1793, *ch 57*, and is thereby punishable. The objections made to the indictment do not appear to the court to have any solidity in them. As the judgment of the court may be either at common law, or under the act of assembly, the conclusion *contra formam statuti*, is not improper; and the crime intended to be committed, being only in aggravation of the assault, it is sufficiently set forth in the manner it is stated.

The criminal court of *Baltimore* county have an undoubted power, we conceive, to order the record of proceedings on an indictment to be transmitted to the adjoining county court, the party charged having previously complied with the directions of the act of 1805, *ch. 65, s. 49*. The criminal court of *Baltimore* county, although denominated the Court of Oyer and Terminer and Gaol Delivery, must be considered as a branch of *Baltimore* county court, exercising criminal jurisdiction only, which is vested in all the other county courts in the state. Unless it is so considered, this consequence will be the necessary result, that the citizens of *Baltimore* county will be deprived of a privilege which is enjoyed by the citizens of all the other counties—the privilege of removing the indictment into an adjoining county, when a fair and impartial trial cannot be had in the county in which the person is indicted. The power is to be exercised in the discretion of the court, according to all the circumstances attending the prosecution, and it being impossible they should appear in the record, neither party can appeal, we think, from the decision of such a question.

The unmeaning expressions that follow the judgment of the court below, are to be rejected as surplusage.

*POLK, J.* dissented.

NICHOLSON, J. I am of opinion, that an assault, with intent to commit sodomy, is punishable by the act of 1793, *ch.* 57. The punctuation of the *tenth* section might perhaps warrant a different construction, by separating the words "or sodomy," from "assault, with intent to commit murder, robbery or rape." Such a construction would confine the punishment to the actual perpetration of sodomy, which clearly was not the intention of the legislature. All the higher offences, such as murder, robbery, rape, burglary, arson, sodomy, and the like, are included in the general antecedent expressions, "felony with or without benefit of the clergy," and the legislature could not mean to descend to a particular designation of a single offence, which had been before made punishable by the general clause. The crime of sodomy is too well known to be misunderstood, and too disgusting to be defined, farther than by merely naming it. I think it unnecessary therefore, to lay the *carnaliter cognovit* in the indictment, particularly as *Stubbs*, a compiler of some repute, gives a form of indictment without these words, and *East*, another author of merited celebrity, does not consider them essential.

The criminal court of *Baltimore* has not, in my judgment, any authority to transmit indictments to an adjoining county court for trial. The act of 1804, *ch.* 55, *s.* 3, does not give the authority, for it speaks only of transmitting proceedings from one *county court* to another *county court*, and manifestly relates only to those courts which had been created by the preceding section. The criminal court of *Baltimore* is not a county court, but a court of limited jurisdiction, established by the act of 1793, *ch.* 57, for especial purposes, and expressly named and styled "*The Court of Oyer and Terminer and Gaol Delivery.*" The county courts are created by the constitution as changed in 1804 and 1805, which declares that they shall be composed of a chief judge, and two associate judges, to be thereafter commissioned by the governor and council, and it has never heretofore been supposed that the criminal court of *Baltimore* was one of these. The *forty-ninth* section of the act of 1805, *ch.* 65, is merely restrictive; it confers no new authority upon any court, but was intended barely to prohibit the removal before the indictment is found.

1810.

Davis  
vs  
The State

1810.

Queen  
vs  
Neale

Although I differ with the other members of the court in some of their reasoning, I nevertheless concur with them in affirming the judgment.

JUDGMENT AFFIRMED.

DECEMBER.

QUEEN VS. NEALE.

A petition for freedom is comprehended within the general terms of suits or actions in the second section of the act of 1804, *ch. 55*, relative to their removal from one county to another, and the county court, in which the suit is instituted, are bound to transmit the proceedings to the judges of any county court within the district, upon the affidavit of either of the parties competent to make an affidavit, or upon such other proper and competent evidence as may be offered in support of the suggestion, that an impartial trial cannot be had &c.

A negro petitioning for his freedom is not competent to make such an affidavit, his slavery or freedom being then *sub judice*, and if a slave he is excluded by the act of 1717, *ch. 13*.

APPEAL from Charles County Court. This was a petition for freedom; and under the act of 1804, *ch. 55*, s. 2, the petitioner, (now appellant,) exhibited her affidavit, stating that she believed she could not have a fair and impartial trial in that court, and by her counsel moved the court to direct that the record and proceedings should be removed as directed by the above mentioned act; but the court, [Clarke, A. J.] overruled the motion. The petitioner excepted. The case was afterwards tried, and the verdict and judgment being for the defendant, the petitioner appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, NICHOLSON, and EARLE, J. by

F. S. Key, for the Appellant; and by Chapman, for the Appellee.

NICHOLSON, J. delivered the opinion of the court. A petition for freedom is comprehended within the general terms of suits or actions in the second section of the act of 1804, *ch. 55*, and the county court, in which the suit is instituted, are bound to transmit the proceedings to the judges of any county court within the district, upon the affidavit of either of the parties competent to make an affidavit, or upon such other proper and competent evidence as may be offered in support of the suggestion that an impartial trial cannot be had in the county in which the petition for freedom is depending.

A negro, petitioning for his freedom, is not competent to make such an affidavit—his slavery or freedom being then *sub judice*, and if a slave, he is excluded by the act of 1717, *ch. 13*.

JUDGMENT AFFIRMED.

MITCHELL, *et al.* vs. RINGGOLD.

1810.

DECEMBER.

APPEAL from *Washington County Court*. *Assumpsit*  
on a promissory note, and for money had and received.  
Plea, the general issue.

Mitchell  
vs  
Ringgold

1. The plaintiffs, (the present appellants) at the trial, read in evidence a paper purporting to be a promissory note, dated the 3d of July 1804, drawn by the defendant, (now appellee,) in favour of *Simon Wilmer*, or order, for \$8000, and endorsed in blank by *Wilmer*. It was admitted to have been signed by the defendant, and endorsed by *Wilmer*, and that the whole of the paper, except the signature of the defendant, was in the hand writing of *Wilmer*. The defendant then offered in evidence, from the paper itself, that since it had passed from his, the defendant's hands, it had been altered by cutting off and obliterating the date it originally bore, and by giving to it a new and different date. He then prayed the court to direct the jury, that if they were satisfied that the date of the paper had been altered since it had passed from the hands of the defendant, and without his privity and consent, that then the paper offered no ground of action against the defendant, but was as to him a nullity. This opinion and direction the court gave. The plaintiffs excepted.

2. The plaintiffs then, to prove that *Wilmer* made the alteration in the date of the note, (if any such had been made,) as agent of the defendant, and was duly authorised to make the same; and that he made the same before the note had been passed to the plaintiffs, read in evidence an agreement between the plaintiffs and defendant in these words: "In some of the cases against *Samuel Ringgold*, the dates of the notes appear to be altered; it is admitted that these alterations were made by *Simon Wilmer*, while the notes were in his possession, and before he passed them to the plaintiffs." And to prove that *Wilmer* had authority from the defendant to alter the date of this note, the plaintiffs read in evidence twenty letters from the defendant to *Wilmer*, which were admitted to be in the hand writing of the defendant, and dated from the 5th of October 1801, to the 19th of June 1804, inclusive. He also read in evidence three notes for \$2500, drawn by the defendant in favour of *Wilmer*, and by him endorsed, dated, one the 10th of July 1801, another the 10th of May 1803, and the other the 20th

If the date of a promissory note is altered after it passes from the maker, and without his privity and consent, the note is a nullity as to him.

Certain letters from the maker of a promissory note to the payee, were held not to contain sufficient evidence of authority to the payee to change the date of the note.

Where a promissory note was delivered by the maker to the payee as his agent, to be discounted, and it was blank as to date and sum at the time of the delivery, and the payee filled up the date and sum, but before he discounted it, and while it continued in his possession, changed the date, and then endorsed it to the plaintiff for a fair and bona fide consideration—Held, that such change destroyed the validity of the note as against the maker.

1810.

Mitchell  
vs  
Blaggold

of September 1803; also another dated the 5th of May 1804 for \$1000. The plaintiffs then offered in evidence, that all the above notes, except the dates, the sums and endorsements, are in the hand writing of the defendant, and that the dates, the sums, and endorsements of *Wilmer's* name, are in the hand writing of *Wilmer*. They also offered in evidence, that the defendant lives now, and has lived for 10 years past, in *Washington* county. And also offered in evidence by a witness, that he had several times seen in the hands of *Wilmer*, notes bearing the signature of the defendant, but whether they had been signed by him he does not know, as he has never seen him write, and is not acquainted with his hand writing; that *Wilmer* had purchased goods of the witness, which were sent to the defendant. The defendant then, to show that the note upon which this suit is brought was transferred by *Wilmer* to the plaintiffs in discharge and satisfaction of a previous debt due from *Wilmer* to the plaintiffs, and not for any purpose beneficial to the defendant, read in evidence the deposition of a witness taken by consent. The plaintiffs then prayed the court for their opinion and direction to the jury, that if they find, from the evidence above stated, that the note upon which this action is brought has been changed or altered in the dating, but that the changes or alterations were made by *Wilmer* as the agent of the defendant, while the note was in his possession, and before it had ever been discounted or transferred to any one, and that after the change had been made, he transferred the same to the plaintiffs for a fair and valuable consideration, that in that case the letters and other proof above mentioned, contain sufficient evidence of authority to *Wilmer* to make the change, and the plaintiffs are entitled to recover. Upon this prayer the court, (*Clagett* and *Shriver*, A. J.) were divided in opinion, and therefore the opinion and direction were not given to the jury. The plaintiffs excepted.

3. The plaintiffs then prayed the opinion and direction of the court to the jury, that if they find from the evidence that the dating of the note has been changed, but that the same was changed while the note was in the possession of *Wilmer*, the agent of the defendant, and by him, and afterwards passed to the plaintiffs, that then the letters, and other proof above stated, are evidence to the jury that *Wilmer* was authorised by the defendant to make the

change. The court refused to give this direction. The plaintiff excepted.

4. The plaintiff also prayed the opinion and direction of the court to the jury, that if they find from the evidence that the note was delivered by the defendant to *Wilmer* as his agent, to be discounted in *Baltimore*, and that the note was blank as to date and sum at the time of such delivery, and that *Wilmer* filled up the date and sum; but before he discounted the note, and while it continued in his possession, changed the date to that which it now bears, and then endorsed it to the plaintiffs for a fair and *bona fide* consideration, that such change does not destroy the validity of the note, and that if the defendant insists that any other alteration has been made so as to destroy the validity of the note; it is incumbent on him to prove that it has been made. Upon this prayer the court were divided in opinion, and the direction was consequently refused. The plaintiffs excepted.

5. The opinion prayed by the plaintiffs in this exception was like that in the next preceding exception, except that it also called upon the court to say, that there was no evidence in the cause of any other alteration of the note than that of its date. Upon this prayer the court were also divided in opinion, and the direction was not given. The plaintiffs excepted. Verdict and judgment being for the defendant, the plaintiffs appealed to this court.

The cause was argued before CHASE, Ch. J. POLK and EARLE, J. by

*Harper*, for the Appellants; and by  
*Key* and *T. Buchanan*, for the Appellee.

THE COURT concurred with the County Court in the opinions expressed in the several bills of exceptions.

JUDGMENT AFFIRMED, (a).

(a) See *Cordwell vs. Martin*, 1 *Campb.* 79, 81, (note;) 180, b, (note 3.)

1810.

Mitchell  
vs.  
Ringgold

1810.

DECEMBER.

ANDERSON VS. JOHNSON.

Anderson  
vs  
Johnson

In assault and battery the defendant pleaded *non cul* and *son assault demesne*, and in mitigation of damages, offered to give in evidence, that the plaintiff had grossly abused two persons, friends of the defendant; and to prove the abuse against them untrue and false, offered to give evidence of the quarrel, and the original cause thereof between the plaintiff and the defendant's friends, which happened sometime anterior to the assault and battery—*Held*, that the evidence was inadmissible

APPEAL from *Saint Mary's County Court*. This was an action of *assault and battery*, brought by the present appellee. The defendant, (the now appellant,) pleaded *not guilty*, and *son assault demesne*, upon which issues were joined. The defendant at the trial offered to give in evidence, in mitigation of damages, that the plaintiff had grossly abused two persons, friends of his, *G P G* and *C E*, one of whom, *G P G*, was then present, and under recognition to keep the peace, the other absent; and to prove the abuse against them untrue and false, offered to give evidence of the quarrel, and the original cause thereof, between the plaintiff and *G P G*, which happened sometime anterior to the assault and battery for which the present suit was instituted. This evidence was objected to by the plaintiff. But the county court, (*Key and Clarke, A. J.*) overruled the objection in part, and permitted the defendant to give in evidence the whole of the quarrel between the plaintiff and *G P G*, and the abusive language of the plaintiff to *G P G* and *C E*, but refused to permit him to give evidence of the truth or falsehood of the abusive and reproachful language used by the plaintiff to *G P G* and *C E*. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. POLK, BUCHANAN, and GANTT, J. by

Chapman, for the Appellant; and by  
W. Dorsey, for the Appellee.

CHASE, Ch. J. The court are of opinion, that the county court went too far in permitting the defendant below to give in evidence the quarrel stated in the exception, and that they did right in refusing to permit him to give in evidence the residue of what he offered to prove.

JUDGMENT AFFIRMED.

ENNISS VS. O'CONNER *et ux.*

1810.

DECEMBER.

APPEAL from *Baltimore County Court* from a judgment rendered in favour of the defendants in that court, (the present appellees,) in an action of covenant. The defendant pleaded the general issue.

1. The plaintiff at the trial read in evidence a contract between him and *Catharine*, (one of the defendants,) whilst she was sole and unmarried, and with whom *Michael*, (the other defendant,) hath since intermarried, by the name of *Catharine Welsh*, dated the 13th of July 1796, as follows: "Articles of agreement between *Catharine Welsh*, of *Baltimore-town*, of the one part, and *Joshua Enniss*, of the place aforesaid, of the other part, witnesseth, that the said *Enniss* doth covenant and agree to finish the carpenter and joiner's work of a house for the said Mrs. *Welsh*, on *Bond street*, in a plain workmanlike manner, as may be adjudged by a carpenter or joiner, as may be hereafter appointed; and the said *Catharine Welsh*, on her part, doth covenant and agree to give the present advance on the measurement of the aforesaid work. As witness," &c. Signed and sealed by the parties. The plaintiff further offered in evidence, by persons not appointed by the parties for that purpose, that he, after the execution and delivery of the contract, and in compliance therewith, did progress in the completion and finishing the carpenter's and joiner's work of the house, mentioned in the contract of the defendant *Catharine*, whilst she was sole and unmarried, in a plain workmanlike manner, and was then and there willing and ready to have completed and finished the whole carpenter's and joiner's work of the house in a plain workmanlike manner, but *Catharine*, whilst sole, &c. refused to permit the plaintiff to finish the whole of the carpenter's and joiner's work, and discharged him from the same. He further offered evidence, by the testimony of witnesses who were not appointed according to the manner prescribed by the contract, that the value of the work so done by him for *Catharine*, whilst sole, &c. at the time he was prevented from proceeding with and finishing the work, amounted to the sum of ———, and that the damages sustained by the plaintiff, by reason of his not being able to finish the work, according to the contract, in consequence of the refusal of *Catharine* to permit him, amounted to the sum of ———.

Enniss  
vs  
O'Conner

In covenant on a contract, where- by the plaintiff agreed to finish the carpenter and joiner's work of a house, for the defendants, in a plain workmanlike manner, as might be adjudged by a carpenter or joiner to be thereafter appointed. The plaintiff progressed in the work, but was prevented from completing it by the defendants, who discharged him. A valuation was made of the work done, by persons not appointed by the parties, and evidence given of the damage sustained in consequence of not being permitted to finish the work. Held, that the plaintiff, in order to entitle him to recover, was bound to show, by a person or persons appointed for that purpose by the parties, that as far as he had progressed in the building he had executed it in a plain workmanlike manner; and that, as the plaintiff had offered no such evidence, it was irrelevant to go into evidence to show that he was prevented from going on with the work by the defendants, or to go into any evidence of the damage sustained by him.

1810.

Ennis  
vs  
O'Connor

But the court, (*H. Ridgely*, Ch. J.) was of opinion, that the plaintiff was bound to show, in order to entitle him to recover, by a person or persons appointed for that purpose by the parties, that as far as he had progressed in the building he had executed the same in a plain and workmanlike manner, according to the averment in the declaration, and that the plaintiff having offered no such evidence, it was irrelevant to go into evidence to show that the plaintiff was prevented from going on with the work by the defendant *Cutharine*, or to go into any evidence of the damage sustained by the plaintiff. The plaintiff excepted.

2. The plaintiff, in support of the declaration, then offered to prove by *G. Hall*, *B. Spencer* and *D. Harrison*, that the defendant had appointed *Harrison* to measure and adjudge the work done by the plaintiff, but that *Harrison* refused to act, unless some other persons were appointed to act with him; that the defendant then nominated *G. Hall*, *J. Boyer* and *J. Moore*, for that purpose; that when *Harrison*, *Hall*, *Boyer* and *J. Moore*, came to the house, *Hall* refused to proceed unless he had the plaintiff's consent, and *Hall*, in the presence of the defendant, requested *Spencer* to go to the plaintiff and ask him if he consented that he or they, (meaning the persons appointed,) he is not certain which, should measure and adjudge the work, to which the plaintiff replied he was satisfied that he or they, (he does not recollect which,) should; which answer of the plaintiff, *Spencer* informed *Hall* of, upon which *Hall* and *Harrison*, *Boyer* and *Moore*, each of them did individually measure and examine every part of the work; and that *Hall*, in making up his opinion of the work, did not rely upon the information or examination of any person but himself, and that his judgment was formed solely from his own measurement and observation on the work, but that *Hall* did not conceive himself authorised to act alone, and said he would not, without the other persons so appointed acted also. That the day after *Hall* had so measured and adjudged the work, he informed the plaintiff that he, together with *Harrison*, *Moore* and *Boyer*, had adjudged and measured the work, upon which he expressed his entire approbation; and that *Hall*, and the other persons so appointed, were carpenters. But the court, (*H. Ridgely*, Ch. J.) refused to permit the above evidence to go to the jury to support the plaintiff's declaration. The plaintiff excepted;

and the verdict and judgment being for the defendants, he appealed to this court.

The case was argued before CHASE, Ch. J. POLK, BUCHANAN, and GANTT, J. by

*Winder*, for the Appellant; and by  
*W. Dorsey*, for the Appellees. He cited *Bristow vs. Wright*, 2 Doug. 666, 667.

The first bill of exceptions was abandoned by the appellant's counsel.

JUDGMENT AFFIRMED.

PIERPOINT'S Adm'rs. vs. PIERPOINT.

DECEMBER.

APPEAL from Baltimore County Court. Covenant by the appellee against the appellants. The general issue was pleaded; and at the trial the plaintiff gave in evidence the following agreement, dated the 17th of October 1799. "I do promise and oblige myself to convey to *Samuel Pierpoint*, or his assigns, six acres of land, lying between his house and *Sam. Clark's*, as I do acknowledge I have received the full purchase money for said land. In witness" &c. Signed and sealed by *Thomas Pierpoint*. And proved that *T. Pierpoint*, the intestate, executed the same. He also gave in evidence a grant dated the 20th of December 1797, issued to *Joseph, Thomas, Walter, Benedict and Samuel Pierpoint*, and *Adam Ground*, as tenants in common, for a tract of land called *Pierpoint's United Defence*, containing 357 acres. He also proved, that the six acres of land, mentioned in the above agreement, is part of the land mentioned in the grant, and that *S. Pierpoint* (the plaintiff,) and *T. Pierpoint*, (the defendants' intestate,) are the same *S. and T. Pierpoint* mentioned in the grant. It was admitted by the parties that *T. Pierpoint* never made a conveyance of the six acres of land mentioned in the agreement to the plaintiff, and that the plaintiff had several times requested *T. Pierpoint* to convey the land to him, which he promised to do, but never did, nor has it ever since been conveyed to the plaintiff, or been in his possession, nor a deed of conveyance for the same ever tendered,

1810.

Pierpoint  
vs  
Pierpoint

Covenant on a promise made in 1799, in writing, under seal, by T. to convey to S. six acres of land, lying in a particular place, the purchase money being received. There had been a grant made to T and S, and others, as tenants in common, of 357 acres of land, which had not been divided, and the six acres were a part of that tract. T died in 1800, who had in his lifetime refused to execute a deed for the land, but there was no evidence that a deed had been tendered to T for him to execute. Held, that S was entitled to recover of the administrators of T, unless they proved to the jury that T had made a regular and legal conveyance of the six acres of land to S, or had tendered a deed for the same.

1810.

Pierpoint  
vs  
Pierpoint

either before or since the death of *T. Pierpoint*, to the plaintiff; and that the plaintiff never tendered a deed of conveyance for the land to *T. Pierpoint* to be executed by him. The defendant then proved, that *T. Pierpoint* died in September 1800; and thereupon moved the court to direct the jury, that to entitle the plaintiff to recover in this action against the defendants, it is incumbent on him to prove to the jury that he had tendered a deed of conveyance of the six acres of land from *T. Pierpoint* to himself, to *T. Pierpoint*, in his life-time, to be executed by *T. Pierpoint*, and that *T. Pierpoint* neglected or refused to execute the same. This direction the court, [*Nicholson*, Ch. J.] refused to give, but directed the jury, that the plaintiff was entitled to recover in this action against the defendants unless they proved to the jury that *T. Pierpoint* had made a regular and legal conveyance of the six acres of land to the plaintiff, or had tendered a deed of conveyance for the same to the plaintiff. The defendant afterwards moved the court to direct the jury, that *T. Pierpoint* was entitled to a reasonable time to have the land, mentioned in the grant, divided between the several tenants in common thereof, before he was bound to make a conveyance of the six acres, mentioned in the agreement, to the plaintiff; and that *T. Pierpoint* died before that reasonable time had expired. But the court refused to give the direction. The defendants excepted; and the verdict and judgment being against them they appealed to this court,

The cause was argued before CHASE, Ch. J. POLK, BUCKANAN, and GANTT, J.

*Winder*, for the Appellants.

*T. B. Dorsey*, for the Appellee. He cited *Halling's case*, 5 Coke, 23. *Heard vs. Wadham*, 1 East, 629. *Seton vs. Slade*, 7 Ves. 278. *Pincke vs. Curties*, 4 Bro. Chan. Rep. 332; and *Smith vs. Burnham*, 2 Anstr. 527.

JUDGMENT AFFIRMED.

CLARKE VS. HARRIS.

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DECEMBER.

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APPEAL from *Baltimore County Court*. This was an action of *assumpsit*, brought by the appellee against the appellant. The declaration contained two counts. The first count sets out a bill of exchange drawn on the 19th of October 1801, by *A. Brown*, on *W. and T. Raikes & Co.* of London, in favour of *Clarke*, (the defendant in the court below,) or order, for £6500 sterling, and by him endorsed to *Harris*, the plaintiff, who endorsed it to *G. Simpson*, the cashier of the Bank of the *United States*, and by him endorsed to *F. Baring & Co.* Averment, that *F. Baring & Co.* on the 19th of January 1802, at London, to wit, &c. caused the bill of exchange to be presented to *W. and T. Raikes & Co.* for their acceptance, but they neglected and refused so to do, and the bill of exchange was protested for nonacceptance, of which premises *Clarke* afterwards, on the 1st of July 1802, had notice. That *F. Baring & Co.* afterwards, when the bill became due and payable, to wit, on the 23d of March 1802, caused the bill to be presented to *W. and T. Raikes & Co.* for payment, but they did not then, or any other time, pay the same, but neglected and refused so to do, and the bill was protested for nonpayment. That by reason of the premises the plaintiff, as endorsee of the bill, was obliged to pay, and did pay, the sum of money mentioned in the bill, together with re-exchange, interest, damages and costs, amounting, &c. to £11,233 6 6 current money, of all which premises, *Clarke*, (the defendant,) afterwards, &c. had notice, by reason whereof he became and was liable to pay, &c. and being so liable, he in consideration thereof afterwards, &c. undertook, and then and there faithfully promised the plaintiff to pay, &c. The second count was for money laid out, paid and expended, by the plaintiff, for the defendant, &c. The general issue was pleaded.

1. The plaintiff at the trial proved that *A. Brown* was a person using trade and commerce, and carrying on mer-

in a book, which he produced, and that the defendant afterwards admitted he had received such written notices. The defendant objected to the testimony, because the notices being in writing, and no notice having been given to him to produce them, no evidence ought to be given of their contents—Held that the evidence was admissible.

Where A drew a bill of exchange on B, for the sole purpose of having it discounted to raise money for the use of A; and for enabling him to do so, C, to whom the bill was made payable, at the request of A, endorsed the bill in blank, and delivered it to A, who afterwards, for the purpose of giving it further credit, and of thereby enabling him to raise money on it for his own benefit, applied to H, who for that purpose endorsed the bill in blank, and delivered it to A, who sold it to S, for his own benefit. The bill was presented to B, the drawee, for acceptance and payment, and not having been accepted or paid, was duly protested and legal notice thereof given to the parties and payment demanded, which was made by H. In an action of *assumpsit* by H, against C, to recover the amount so paid—Held, that H was entitled to recover from C the sum of money so paid by him.

In such an action it need not be averred in the declaration that the defendant had notice of the protest for nonpayment of the bill, and that the plaintiff had paid the amount, &c.

In *assumpsit* on a foreign bill of exchange by the second endorser, who had paid the bill, against the payee, evidence was offered to prove that the original bill, and an original protest for nonacceptance, and protest for nonpayment, were delivered to the attorney of the holder of the bill, for the purpose of instituting suits thereon against the payee and second endorser, (the plaintiff and defendant in this action.) Records of the judgments rendered in those suits on the said bill were also offered in evidence; and also parol evidence that the protest for nonacceptance was lost or mislaid—Held, that the testimony was proper and competent to prove the protest for nonacceptance of the bill.

A witness, an agent of the holder of a bill of exchange, proved, that in the usual course of the post he received protests for the non acceptance and non payment of the bill, and on the days that he received them he gave the defendant (he payee,) verbal notice of such protests, and shortly after, either the same or the next day, for greater certainty made out written notices to be sent to the defendant of the protests, &c. copied the same

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chandise at the city of *Baltimore*, on, after and before, the 19th of October 1801, and that he drew his bill of exchange for £6500 sterling on *W. and T. Raikes*, merchants of *London*, by the names of *W. and T. Raikes, & Co.* in favour of *Clarke*, the defendant, or order. And that *Clarke* afterwards endorsed the bill of exchange to *Harris*, or order, and that *Harris* afterwards endorsed it to *G. Simpson*, cashier and agent of the Bank of the *United States*, or order, for and on account of the president, directors and company, of the Bank of the *United States*; and further, that *Simpson* afterwards, as agent of the president, directors and company, of the Bank of the *U. S.* endorsed the bill to *F. Baring & Co.* or order, and that afterwards *F. Baring & Co.* caused the bill to be protested for nonpayment thereof, viz. on the 23d of March 1802. And the plaintiff offered to prove by the oath of *D. Harris*, for that purpose sworn to the jury, that the original bill of exchange, together with an original protest thereof for non-acceptance, and protest for nonpayment thereof, came to his hands as agent for the Bank of the *U. S.* and were respectively delivered by him to the district attorney of the *U. S.* for the purpose of instituting suits on the bill against *Clarke*, (the defendant,) and *Harris*, (the plaintiff). He also offered in evidence the records of proceedings in the circuit court of the *U. S.* in and for the *Maryland* district, against *Harris* and *Clarke* respectively, at the suit of *G. Simpson*. And offered to prove, that the bill of exchange in those records mentioned is the same bill offered in evidence in this cause; and that *Simpson*, the plaintiff in the records, is the same *Simpson* who is cashier and agent of the Bank of the *U. S.* and that *Harris*, the plaintiff in this suit, and *Clarke* the defendant in this suit, are respectively the same persons who were defendants in the records. He then offered to prove by *D. Harris*, that the protest for nonacceptance of the bill of exchange is not in his possession, nor in the possession of the district attorney of the *U. S.* nor in the office of the clerk of the circuit court of the *U. S.* among the other papers, but is lost or mislaid; and therefore offered, under such circumstances, to be permitted by parol to prove the protest for nonacceptance. To the admissibility of which evidence the defendant objected. But the county court, [*Nicholson*, Ch. J. and *Hollingsworth*, A. J.] were of opinion, that the testimony

was proper and competent to prove the protest for nonacceptance. The defendant excepted.

2. The plaintiff then offered to give in evidence by *D. Harris*, the cashier of the Office of Discount and Deposit, that in the usual course of the post from *Philadelphia* to *Baltimore*, he received a letter from *G. Simpson*, cashier of the Bank of the *U. S.* dated the 3d of April 1802, enclosing protests for nonacceptance of the bill of exchange, and that he, on the day he received the same, called on the defendant, and gave him verbal notice of such protest; and shortly after, he believes on the 8th of the same month, for greater certainty, he made out a written notice to be sent to the defendant of the protest, and copied such notice in a book, which the witness produced to the court, and that the defendant did afterwards admit he had received the written notice. The plaintiff further offered to give evidence by *D. Harris*, that he received a letter from *Simpson*, dated in *Philadelphia* the — day of — 1802; containing protests of the bill of exchange for nonpayment, and that he received the same in the usual course of the post from *Philadelphia* to *Baltimore*; and that on the day of receiving the same, he called on the defendant, and gave him verbal notice of the last protests; and that on the same or the next day he, for greater certainty, made out a written notice to the defendant, and delivered the same to *L. G.* to be delivered to the defendant, and that the witness copied this notice in a book, then produced by him; and did offer to prove by the witness, that the defendant did afterwards acknowledge to him the receipt of the written notice. To this testimony, the defendant objected, because the notices being in writing, and no notice having been given by the plaintiff to the defendant to produce them, no evidence ought to be given of their contents. But the county court, [*Nicholson*, Ch. J. and *Hollingsworth*, A. J.] were of opinion, that such evidence was admissible to be given to the jury; and the same was accordingly given. The defendant excepted.

3. The plaintiff then gave in evidence, that the bill of exchange was made by *Brown* for the sole purpose of being discounted to raise money for his own use; and that for enabling him to do so the defendant, at the request of *Brown*, and for the sole purpose of enabling him to raise money thereon, but without any other consideration, did

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endorse the bill in blank, and immediately delivered it back, so endorsed, to *Brown*, but at that time had no knowledge or information that the bill was to be endorsed after him by the plaintiff, or that *Brown* intended to apply to the plaintiff to endorse the bill. And further gave in evidence, that *Brown*, after receiving back the bill so endorsed by the defendant, carried it to the plaintiff, and requested him to endorse the bill after the defendant, for the purpose of giving it further credit, and of thereby enabling him, *Brown*, to raise money on it for his own benefit. That the plaintiff, in compliance with this request, and for the purpose of giving additional credit to the bill, and to enable *Brown* to obtain money thereon for his own use, did endorse the bill in blank, and immediately delivered it back, so endorsed, to *Brown*, in blank, who soon after sold it to *G. Simpson*, cashier of the Bank of the U. S. for his *Brown's* own benefit. That at the time of the endorsements no consideration had taken place between the plaintiff and defendant respecting the bill or endorsements, or respecting any endorsement to be made by them, or either of them, for *Brown*, or for his use or benefit; and that the plaintiff received no consideration for the endorsements, except such as might arise in law from the previous endorsement of the defendant, and from the making of the bill by *Brown*, and that the bill was never delivered to the plaintiff or to the defendant *Brown*, except for the purpose before mentioned. The plaintiff also gave in evidence, that the bill having been sold to *Simpson*, as before mentioned, was duly presented to the drawee for acceptance and payment, and not having been accepted or paid, was duly and regularly protested, for nonacceptance and nonpayment; of which protest notice was duly and legally given by *Simpson* to *Brown*, and to the plaintiff and defendant, and payment thereof immediately demanded by *Simpson* of *Brown*, who failed to pay it. Whereupon, notice of the failure was duly given by *Simpson* to the plaintiff and defendant, and payment of the bill was demanded of them by *Simpson*. The plaintiff further gave in evidence, that he and the defendant, being so called on for payment of the bill, did mutually agree that each of them should pay one half of the sum of money due thereon, but that the right of the plaintiff to recover from the defendant, as the prior endorser of the bill, the sum so by the plaintiff to

be paid, with interest, should not in any manner be affected by the agreement. And that the plaintiff did, in pursuance of that agreement, on the 12th of December 1802, pay to *Simpson*, cashier of the Bank of the U. S. the sum of \$15,206 67, being one half of what was then due on the bill. The defendant then prayed the court to direct the jury, that the plaintiff, if the jury should believe the facts so offered in evidence by him, is not entitled in law to recover in this action the sum so paid by him to *Simpson*, cashier of the Bank of the U. S. Which opinion, [*Nicholson*, Ch. J.] refused to give. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this court.

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The cause was argued at the last term before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J. and was reargued at the present term before CHASE, Ch. J. POLK, BUCHANAN, GANTT, and EARLE, J.

*Shauff*, *W. Dorsey*, *Winder*, and *S. Chase, jr.* for the Appellant, contended, 1. That the declaration was defective, because it was not averred in the *first count* that the defendant had notice of the protest of the bill of exchange for nonpayment; and that the plaintiff took up the bill by paying it, &c. They cited *Rashton vs. Aspinall*, Doug. 683.

2. That if this count is defective, there being a general verdict, it would not be cured, even if there should be a good count in the declaration. They cited *Marriot vs. Lister*, 2 Wils. 141. *Holt vs. Scholefield*, 6 T. R. 691; and *Baldwin vs. Elphinston*, 2 W. Blk. Rep. 1037.

3. That the plaintiff could not recover on the money count stated in the declaration, they cited *Chitty on Bills*, 378, and *Gibson vs. Minet*, 1 H. Blk. Rep. 602.

On the *first bill* of exceptions they contended, 1. That it was not competent for the plaintiff below to give in evidence the records of the circuit court, because they were between different persons than the parties in this action.

2. That no parol evidence ought to be admitted to prove a protest of a bill of exchange for nonacceptance or nonpayment.

On the *first point*, they referred to *Peake's Evid.* 34, 35. *Bryden vs. Taylor*, 2 Harr. & Johns. 296. *Gittings's Lessee vs. Hall*, 1 Harr. & Johns. 18; and *Davis's Lessee*

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*vs. Batty, Ibid* 264. On the *second point*, they cited *Peake's Evid.* 107; and *Shaw vs. Markham, Peake's N. P.* 165.

On the *second bill of exceptions*, they contended, 1. That parol evidence that notice in writing had been given to the defendant, ought not to have been admitted, without a previous notice to the defendant to produce such written notice.

2. That notices of the nonacceptance, and nonpayment of the bill of exchange, were not given by the plaintiff to the defendant, but by a third person. On this point they cited *Tindall vs. Brown*, 1 *T. R.* 167; and *Ex Parte Barclay*, 7 *Ves.* 597.

*Key, Harper, and T. Buchanan*, for the Appellee, as to the defects in the *first count* in the declaration, referred to the act of 1809, *ch.* 153, *s.* 2.

On the *first bill of exceptions*, they cited *Peake's Evid.* 97, and *Chitty on Bills*, 239, 240.

On the *second bill of exceptions*, they cited *Chitty on Bills*, 239, 240. *Stedman vs. Gooch*, 1 *Esp. Rep.* 5. *Kufh vs. Weston*, 3 *Esp. Rep.* 54. *Saunderson vs. Judge*, 2 *H. Blk. Rep.* 509. *Chapman vs. Lipscombe*, 1 *Johns. Rep.* 296; and *Gotlieb vs. Danvers*, 1 *Esp. Rep.* 455.

On the *third bill of exceptions*, they referred to *Wood vs. Repold*, (*ante* 125.)

THE COURT agreed with the County Court in the opinions given in the several bills of exceptions.

JUDGMENT AFFIRMED.

DECEMBER.

RINGGOLD vs. TYSON.

In *assumpsit* on a promissory note by the endorsee against the drawer, the payee is a competent witness to prove the note had been paid to the plaintiff.

He is also competent to prove that the note was given on a usurious consideration.

The endorsee or holder of a promissory note cannot recover in his own name on an endorsement in blank.

APPEAL from *Washington County Court*, from a judgment rendered in favour of the plaintiff in that court, (the present appellee,) in an action of *assumpsit* on a promissory note, drawn by the defendant, (the appellant,) on the 5th of May 1804, payable to *S. Wilmer*, or order, for \$1000, and by *Wilmer* endorsed to the plaintiff. The declaration also contained counts for money lent and advanced, for money had and received, and for money laid out, expended and paid. Plea, the general issue.

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1. At the trial in March 1807, the plaintiff read in evidence the promissory note declared on, and which was admitted to have been drawn and signed by the defendant, and endorsed by *Wilmer*. [The endorsement by *Wilmer* was in blank.] The defendant then read in evidence a release, dated the 26th of March 1807, from himself to *Wilmer*, "of and from all claims, debts, dues and demands, of every nature and kind whatsoever," &c. which was admitted by the plaintiff to be duly executed, signed, sealed and delivered, by the defendant to *Wilmer*. And also a release, dated the same day from *Wilmer* to the defendant, "of and from all manner of debts, dues and demands, contracts and agreements, of every nature and kind existing between them," &c. This release the plaintiff also admitted was duly executed, signed, sealed and delivered, by *Wilmer* to the defendant. The defendant then produced *Wilmer*, and offered to prove to the jury by him, that on or about the 10th of July 1804, he as the agent of the defendant, paid the amount of the note to the plaintiff, to whom the same had been endorsed by *Wilmer*. But the court, [*Clogett* and *Shriver*, A. J.] rejected the witness as incompetent to prove those facts. The defendant excepted.

2. The defendant then offered to prove by *Wilmer*, a conversation with the plaintiff, in which he admitted that he was not entitled to recover in this suit any thing from the defendant upon this particular note, the same having been paid. This evidence the court also refused to let him give. The defendant then prayed the court to direct the jury, that the plaintiff was not entitled to recover. This direction the court refused to give. The defendant excepted.

3. The defendant then offered to prove by *Wilmer*, that he the defendant drew the note, upon which this suit is brought, payable to him, *Wilmer*, for the purpose of raising money thereon for the use of him, the defendant, and without any value passing from *Wilmer* to the defendant. That *Wilmer* called upon the plaintiff with the note, and informed him that he was the agent of the defendant, and that he wanted to borrow money for the defendant upon the note. That the plaintiff did thereupon discount the note at a discount upon the sum therein expressed, at the

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rate of three *per centum per month*, and took and received from *Wilmer*, as the agent of the defendant, the note at the price of \$940, which sum, and no more, the plaintiff paid to *Wilmer* for the defendant, as and for the price of the note. That in consequence of the money so paid, *Wilmer* endorsed and delivered the note to the plaintiff. But the court refused to permit *Wilmer* to be sworn to the jury to prove these facts, or any of them, and rejected him as an incompetent witness. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this court.

This cause was argued before CHASE, Ch. J. GANTT, and EARLE, J.—BUCHANAN, J. having been concerned as counsel did not sit. The questions which arose in this case had been argued in this court on the *Eastern Shore* in the case of *Lloyd vs. Tyson*, before POLK, BUCHANAN, and GANTT, J.—EARLE, J. having been concerned as counsel did sit in that case.—NICHOLSON, J. did not sit in either case.

*Martin, Key, and T. Buchanan*, for the Appellant, stated, that the first and third bills of exceptions presented two questions—1. Whether or not a payee of a promissory note was a competent witness, in an action by the holder against the drawer to prove payment—mutual releases having been executed to each other by the payee and drawer? And 2. Whether or not he was competent to prove that the note was void in its creation, as given on a usurious consideration? To show that he was a competent witness, they cited *Clarke vs. Shee & Johnson*, *Cowp.* 199. *Peake's Evid.* 161, 144, 180, 181. *Charrington vs. Milner*, *Peake's N. P.* 6. *Phethcon vs. Whitmore*, *Ibid* 40. *Humphrey vs. Moxon*, *Ibid* 52. *Adams vs. Lingard*, *Ibid* 117. *Rich vs. Topping*, 1 *Esp. Rep.* 176. *Jordaine vs. Lashbrooke*, 7 *T. R.* 601. *Birt vs. Kershaw*, 2 *East*, 458. 1 *Esp. Dig.* 259. *Staples vs. Oakes*, 1 *Esp. Rep.* 382. *Chitty on Bills*, 282, 283, 284, 52, 205. *Dickinson vs. Prentice*, 4 *Esp. Rep.* 32. *Shuttleworth vs. Stephens*, 1 *Campb.* 407, (and note.) *Kyd on Bills*, 283. *Brown vs. Davies*, 3 *T. R.* 81. *Lowe vs. Waller*, *Doug.* 736. *Abrahams, qui tam, vs. Bunn*, 4 *Burr.* 2251. *Baker vs. Arnold*, 1 *Caine's Rep.* 275, 276. *Twambly vs. Henley*, 4 *Mass. Rep.* 442. *Bliss vs. Thompson*, *Ibid* 491. *Bosquet vs. Dashwood*, *Ca.*

*temp. Talb.* 38; and *Wilson vs. Lenox*, 1 *Cranch*, 261, (note.)

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On the second bill of exceptions, they stated the question to be, whether an endorsee could bring an action in his own name on a promissory note endorsed in blank by the payee? To show that he could not, they cited *Clark vs. Pigot*, 1 *Salk.* 126. *Lucas vs. Haynes*, 2 *Ld. Raym.* 871. *Bull. N. P.* 275, 278. 1 *Esp. Dig.* 28. *Chitty on Bills*, 117; and *Gray & Biddle vs. Wood*, 2 *Harr. & Johns.* 328.

*W. Dorsey, Harper, and Winder*, for the Appellee, on the first and third bills of exceptions, cited *Walton vs. Shelly*, 1 *T. R.* 296. *Bent vs. Baker*, 3 *T. Rep.* 27. *Chur- rington vs. Milner*, *Peake's N. P.* 6. *Phetheon vs. Whit- more*, *Ibid* 40. *Humphrey vs. Moxon*, *Ibid* 52. *Adams vs. Lengard*, *Ibid* 117. *Rich vs. Topping*, 1 *Esp. Rep.* 176. *Hart vs. McIntosh*, *Ibid* 298. *Jordaine vs. Lash- brooke*, 7 *T. R.* 601. *Caldwell vs. Bull*, (a). *McCullough vs. Houston*, 1 *Dall. Rep.* 441. *Stille vs. Lynch*, 2 *Dall. Rep.* 194. *Baker vs. Arnold*, 1 *Caine's Rep.* 258. *Winton vs. Saidler*, 3 *Johns. Cas.* 185. *Coleman vs. Wise*, 2 *Johns. Rep.* 165; and *Churchill vs. Suter*, 4 *Mass. Rep.* 156.

CHASE, Ch. J. In this case, which is a suit brought by the endorsee of a negotiable promissory note against the

(a) The case here referred to of *Caldwell vs. Bull*, in this court at December term 1809, was an appeal from *Baltimore County Court*. It was an action of *assumpsit*, for goods sold and delivered, and the general issue was pleaded. At the trial the defendant, (now appellee,) offered in evidence by way of set off, a promissory note drawn by the plaintiff, (the appellant,) in favour of *William Hays*, and by him endorsed to the defendant. The plaintiff then offered to prove by *Hays*, that while the note remained in his possession, and before he endorsed it to the defendant, he erased from the body of the note the name "*William Hays*," and in this defaced state delivered the note to one *Barklie*, a broker, and requested him to negotiate it by selling it, and that *Barklie* did offer it for sale, but was unable to sell it. That *Hays* afterwards inserted the name "*William Hays*" in the body of the note, and endorsed it to the defendant, to whom he communicated the circumstance of the erasure, before and at the time he endorsed the note. The defendant objected to the proof of the erasure by *Hays*, on the ground that it might tend to invalidate the note; and that *Hays* was an incompetent witness to invalidate an instrument to which he had given credit by endorsing it, and passing it away. And the court, [*Nicholson*, Ch. J. and *Hollingsworth*, A. J.] sustained the objection, and directed the jury, that *Hays* was an incompetent witness to prove the erasure. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court, where the judgment was affirmed by consent.

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drawer, three questions on bills of exceptions are brought before this court for their decision.

The *first* question is, whether the endorser can be received as a witness to prove payment of the money to the plaintiff?

The *second* question is, whether he is a competent witness to prove the note was given on an usurious consideration?

The *third* question is, whether the endorsee of a promissory note can recover in his own name on an endorsement in blank?

The two first questions are of the greatest importance, and have claimed the particular attention of the court, because on our judgment depends one of the principal rules of evidence which will be adhered to or relaxed accordingly, in this state, in future.

These questions have been ably discussed by the counsel for the parties, and all the cases and law relating to them have been brought before the court, and with great strength of argument observed on.

The objection to the endorser being received as a witness, is grounded on the rule laid down in *Walton vs. Shelly*, that no person shall be admitted as a witness to impeach or invalidate an instrument or writing which he has signed and given credit to.

This is acknowledged to be a rule of policy, and adopted by the court in that case in conformity to a maxim of the civil law, *nemo allegans suam turpitudinem est audiendus*. This as a rule of evidence was unknown in the common law courts in *England* prior to that case.

The rule that prevailed antecedent to that time, and as a rule of the common law, is, that every person not interested in the event of the suit was admissible as a witness.

It is certain this rule was deviated from, and I think infringed by the decision of the court in that case; and the evils resulting from it as a general rule pressed so hard upon the court, and involved them in so many difficulties, by interfering with the decisions of the courts in other cases, as to induce them to modify it; and in three years afterwards they restricted it to the case of negotiable instruments; and after relaxing it from time to time, they exploded it in the case of *Jordain vs Lashbrooke*, 7 *T. R.* 601, and re-established the rule which prevailed according to the principles of the common law.

Unquestionably the rule in *Walton vs. Shelly* cannot prevail as a general rule, because in the cases of wills, deeds and bonds, the witnesses to them may be examined to impeach their validity; in the first case to prove the insanity of the testator, in the second case to prove the deed was not sealed or delivered, and in the third case to prove the bond was given on an usurious consideration—or that the obligor was unlettered, and that the bond was not read or was misread to him. The witnesses in these cases, by their attestations, held out there was no legal objection to them, and that they will prove those requisites which are essential to their validity.

The decision in *Walton vs Shelly* is overruled by the court in *Jordaine vs. Lushbrooke*, and the law considered as settled in *England*. The cases at *nisi prius* conformed to *Walton vs. Shelly*, while it remained the ruling decision, although the courts indicated an inclination to modify and relax the restriction. Lord *Mansfield* said, the rule is founded in policy, and on that ground it was adopted. It is the duty and province of the court *dicere non legem*, and if the rule was not known at that time as a rule of evidence at the common law, the court's opinion as to its policy would not warrant them in the adoption of it.

An accomplice is a legal and competent witness against the principal, and in giving testimony must declare his own turpitude and participation in the crime, which is a circumstance that impeaches his credit. The maxim of the civil law, when considered with reference to the common law, may be understood as affecting the credit of the witness, and declaring that he stands in that predicament which renders his testimony suspicious, and that he ought to be heard with caution.

At one time an underwriter on a policy, in a suit against another underwriter on the same policy, was held to be an incompetent witness, and rejected from the supposed bias on his mind resulting from a community or similarity of interest. That doctrine has been exploded as a deviation from, or infringement of, the common law rule of evidence, that every person who is not interested in the event of the suit is a competent witness. An heir at law is admitted as a witness in a suit brought by his ancestor, relating to the bounds of his land, notwithstanding the bias on his mind from the expectation of his inheriting the land. All

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these cases indicate plainly, and recognize the rule, that a person not interested in the event of the suit is a competent witness, and cannot be incapacitated by the situation in which he stands, from whence a bias on his mind is inferable.

It is the peculiar and exclusive right and province of the jury to decide on the credit of witnesses, and the court cannot declare them incompetent, from any conjectural influence on their minds inclining them to favour one party more than the other: the jury, in forming their opinion, will consider all circumstances attending the witness in giving his testimony.

The common law is part of the law of *Maryland*, and cannot be abrogated or impaired by any principle or maxim of civil law. The rule of evidence, so often recurred to, is a rule established by the common law, and was in full force and operation in this state, at the time of the decision in *Walton vs. Shelly*, which introduced the maxim of the civil law, as an exception to that rule, on the ground of policy.

That decision has been the ground of the judgments in the courts of the states, and their decisions must rest on that authority, and cannot be entitled to more weight.

The maxim of the civil law may be considered as confined to the parties, and was so considered by the judges, (*Gross and Lawrence.*)

A plaintiff, whose action arises *exturpi causa*, shall not be heard in alleging his own turpitude in support of his action against a *particeps criminis*.

To illustrate the position, A promises B a sum of money if he will grant him an office which concerns the administration of justice, or procure it to be granted, and the office is obtained, and A refuses to pay the money—B cannot recover it. So if A gives B a sum of money to procure him an office, and B so expends the money, and the office is not obtained, A cannot recover the money of B, or the person to whom it was paid.

So in the case of simony, where A promises to pay B a sum of money if he will procure him to be presented and instituted to a chapel, which was a donative in the King's gift; and B does procure him to be thus presented and instituted, B cannot recover the money of A.

In support of such actions the plaintiffs cannot be heard because of the illegality and turpitude of the consideration.

As to the *third* question. The legal operation of an endorsement in blank, in cases in which the sum is filled up in the bill, confers a right in the holder to consider it as a transfer to himself, or an authority to receive the money from the drawee, for the use of the endorser, and he makes his election accordingly, by filling it up as a transfer or authority; and as it has not been filled up as a transfer in this case, the plaintiff below cannot support the action.

POLK and BUCHANAN, J. concurred

GANTT, J. dissented.

EARLE, J. I concur in the judgment of the court upon the *two first* bills of exceptions in this cause.

If the endorsee was not a competent witness for all purposes, it must be acknowledged he was for some. He might have been sworn to prove that the note was paid by *Ringgold* to *Tyson* after the endorsement of it, and no solid objection could have been raised to his being permitted to state, that as the agent of *Ringgold* he made the payment.

A blank endorsement of itself transfers no interest in a bill of exchange or promissory note. Independent of the authorities referred to by the counsel of the appellant upon this point, a cause, lately determined in the court of appeals on the eastern shore, concludes the question. It was the action of *Joseph Wood*, and *Elizabeth* his wife, for the use of *Benjamin Sluyter*, against *Gray & Biddle*. It originated in *Cecil* county court, on a promissory note passed to the wife while sole, and by her endorsed in blank to *Sluyter*, whose pleasure it was to use the names of the husband and wife in the prosecution of his action. At the trial the defendants offered to prove, that value passed from *Sluyter* at the time of the endorsement, and was the consideration of it; and meant to contend, that the property in the note was transferred, and that the suit ought to have been in the name of *Sluyter*, as endorsee. But the court held, that the title to the note was not assigned by the blank endorsement; and the rejection of the testimony having produced a bill of exceptions, their judgment was reversed and affirmed in this court. 2 *Harr. & Johns.* 328.

In the *third* bill of exceptions in the record, a more serious point is presented for consideration, and in deciding

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it, I must *also* beg leave to dissent from the judgment pronounced by the court. I am for uniting with the courts of judicature in the commercial states of *Massachusetts*, *New York* and *Pennsylvania*, in giving stability to a legal principle that will restrain men from invalidating negotiable paper, to the credit and currency of which they have contributed by the endorsement of their names; as well for the sake of preserving within the union, a uniformity in the adjudication of great mercantile questions, as because I deem the principles of the case of *Walton vs. Shelly*, the law of this state. It has been adjudicated, it is true, since the establishment of our independence, and in this view, it is not a binding authority in our courts of justice; but it unquestionably contains a recognition of the principle contended for, as a principle well understood in King's Bench in the year 1786, and perfectly familiar to the learned in the profession of the law at that period. Lord *Manfield*, and the other judges, who sat in the cause, and particularly Judge *Buller*, treated the rule, "that a party to a negotiable instrument shall not be received as a witness to invalidate it," as a known and long settled general rule of law; and the counsel, who argued in behalf of the plaintiff and defendant, on the one hand asserted, and on the other admitted, the existence and propriety of the principle, and only differed about the application of it to the subject then under discussion. My deduction from the report of this case is, that the rule in question was established long anterior to 1786, and this opinion seems to receive strength from considering the case of *Abrams vs Bunn*, decided about the year 1768, where the rule is glanced at, if not recognized, by the judge, in stating the reasons of the judgment of the court. Whether this case is the law of *Great Britain* at this day, is a question which need not be inquired into. For it is certain that general principles, confessedly a part of the common law at the time of our revolutionary war, cannot be affected or altered by the subsequent decisions of foreign tribunals. But if I was to hazard an opinion on the question, I should say that *Walton vs. Shelly* is still authority in *England*. *Jourdain vs Lashbrooke* contradicts it; but it cannot be concealed, that the competency of witnesses was by that decision enlarged, to prevent evasions of a statute that materially affected the revenue of the kingdom; and it is to be remarked, that the

case itself has never received the sanction of the supreme appellate jurisdictions of that country. When *Winton vs. Saidler* was determined in *New York* in the year 1802. (it was the first time the point occurred in that state,) it is impossible to suppose the judges were unapprized of *Jourdaine vs. Lashbrooke*; and yet we find them acknowledging the principles of *Walton vs. Shelly* in their fullest extent. They must have proceeded upon the ground that the latter case, from the peculiarity of its circumstances, did not unsettle the authority of the former, or, as I think on this occasion, they must have believed, that *Walton vs. Shelly* refers to rules and principles which existed long antecedent to the controversy between those parties.

The case now before the court falls within the reason of *Walton vs. Shelly*, and according to my judgment ought to be decided by it, although there is a striking feature in the facts which distinguishes it in some degree from that authority, and from almost all the cases determined upon the same subject. It was not proposed to prove by *Wilmer*, the endorsee, that the note was given upon an illegal contract, and therefore void *ab initio*; but supposing it was a valid instrument, he was offered as an evidence to prove the illegality of the consideration upon which he transferred it to the endorsee. The cause of action itself was not to be impeached; but as the suit could not be sustained without the aid of the endorsement, a recovery was to be barred by showing it to be a nullity. The admission of the testimony thus putting it in the power of the witness, not merely to destroy a paper to which he had given credit by his name, but to abrogate his own act of endorsement, and thereby in effect release the defendant from a debt which, from any thing that appears to the contrary, is *bona fide* due and owing from him.

I am of opinion, that the judgment of the court below, in the *third* bill of exceptions, ought to be affirmed.

JUDGMENT REVERSED.

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S C was appointed under the act of 1783, *ch* 35, agent on the part of the state, to receive a transfer of stock in the Bank of England belonging to the state, and he was allowed a commission of 4 per cent on the net sum to be by him received, in full satisfaction for his trouble. O H, having a claim against the state on account of land mortgaged to him by D D, which land was confiscated by the state, the agent was by the act of 1786, *ch* 50, authorised to assign to O H a portion of the bank stock, not exceeding £11,000. By the act of 1801, *ch* 103, the minister of the U S in London was vested with authority to receive a transfer of the stock and all dividends due, and to transfer to the agent 4 per cent in bank stock on the amount which might be transferred to him, and pay to the agent the like *per centum* on the dividends received. The minister received a transfer of the stock, and transferred to O H to the amount due to him, and to the agent he transferred to the amount of 4 per cent commission on the entire capital of the bank stock. *Held*, that the agent was entitled to 4 per cent commission on the stock so transferred to the minister.

APPEAL from *Anne-Arundel* County Court. This was an action of *assumpsit*, brought against the state, for money had and received, and for sundry matters properly chargeable in account. The general issue was pleaded. At the trial it appeared in evidence, that under the act of April 1783, *ch* 35, *Samuel Chase*, the plaintiff, (now appellee,) was appointed agent and trustee, on the part of the state, to execute several trusts, &c. relative to the capital stock in the Bank of *England* belonging to the state, and to receive a transfer thereof, and sell the same, &c. and for which he was allowed a commission of four *per cent*. on the net sum by him received, in full satisfaction for his trouble. By the act of 1801, *ch* 103, the minister of the *United States* in *London* was vested with authority to receive, in his own name, in behalf of the state, a transfer of the stock, and all dividends due; and that he should transfer to the plaintiff four *per centum* in bank stock on the amount which might be transferred to him; and pay to the plaintiff the like *per centum* on the amount of any dividends due, which the minister might receive. *Osgood Hanbury* and Co. being creditors of *D. Dulany*, he executed to them a mortgage of his lands, which lands were confiscated by the state, and on application of *Hanbury* and Co. to the state for the payment of their debt, the act of 1786, *ch* 50, authorised the plaintiff to assign to them a portion of the bank stock, not exceeding £11,000 of the capital of the said stock. (*See Barclay vs. Russell*, 3 *Vesey*, 424). On the 1st of May 1803, the stock claimed by the state amounted to £187,567 12 0; but in the course of negotiations, on account of claims, &c. it was reduced; and on the 14th of August 1804, *William Pinkney*, esquire, the then minister of the *United States*, received a transfer for £100,940 0 1, entire capital bank stock, £6,976 1 8, navy 5 p. c. annuities, £8,314 16 1, 5 p. c. annuities of 1797, and cash paid to him £5,865 7 5, and he transferred to *Hanbury's* executors £19,910 bank stock, £1531 navy 5 p. c. £1825, 5 p. c. of 1797, and paid them in cash £1237, in satisfaction of their claim of £11,000 bank stock, which was directed by the state to be assigned in payment of the debt of *Hanbury* and Co. The said minister caused to be transferred to the agent £4037 bank stock for his commission on the

entire capital of bank stock, retaining the commissions on the annuities and cash, to answer the sum of money received by the agent's solicitors, by way of costs, and he caused to be transferred to the use of the state, £66,993 0 1 bank stock, £5445 1 8, navy 5 p. c. £6,489 16 1, 5 p. c. of 1797, and paid in cash £3,918 7 5. Part of the claim of the plaintiff in this action was for his commission of 4 p. c. on the annuities transferred and cash paid to *Hanbury's* executors; but it was resisted by the attorney general on the ground, that it was agreed by Mr. *Pinkney*, in order to obtain a transfer of the stock, that immediately on its being made to him, he would transfer the sum of £19,910 bank stock to *Hanbury's* executors; and on the stock being transferred, he did transfer that amount to *Hanbury's* executors; and the court were called on by the attorney general to direct the jury, that the plaintiff was not entitled to a commission of 4 p. c. on the said stock so transferred to *Hanbury's* executors. But the court, [*Chase*, Ch. J. and *Harwood*, A. J.] were of opinion, that if the jury should find the above fact, and should also find from the evidence, that the said transfer was made to *Hanbury's* executors, to pay and satisfy a debt due from the state to *Hanbury*, by mortgage from *Dulany*, on land confiscated by the state, that in such case the state received the beneficial use of the stock so transferred, and the plaintiff was entitled, according to his contract with the state, and the several acts of the legislature confirmatory thereof, to 4 p. c. commission on the said stock thus transferred by Mr. *Pinkney*. The court were also of opinion, that the liability of the state to pay the said debt, did not depend on the bank stock, and if it had not been obtained by suit or negotiation, the obligation of the state to pay the said debt, would have remained, as it arose from the act of confiscation, and was secured by the treaty of peace. That the said claim of *Hanbury* had no connexion with the bank stock, nor was a lien on the same; that the only subject of negotiation was the right of the state to the bank stock, and the means used to obtain it could not be considered as a part of the subject of negotiation. The attorney general excepted on the part of the state; and the verdict and judgment being for the plaintiff, this appeal was prosecuted on the part of the state.

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The cause was argued before BUCHANAN, GANTT, and EARLE, J. by

Johnson, (Attorney General,) for the State; and by Martin, for the Appellee, and by the Appellee in *propria persona*.

THE COURT agreed in opinion with the court below as expressed in the bill of exceptions.

GANTT, J. dissented.

JUDGMENT AFFIRMED.

DECEMBER.

LEGOUX, *et al.* vs. WANTE.

To a bill in chancery for the sale of mortgaged premises, the defendant answered, that the mortgage was executed to secure the payment of money loaned at a usurious interest, and he exhibited certain interrogatories to be answered by the complainant. *Held*, that the principle of equity is, that no person is bound to answer so as to subject himself to punishment; but not so where the answering would create or occasion a forfeiture of his estate. The answer of the complainant admitting the usury, might subject him to a forfeiture or fine for the offence.

Where the person who may have borrowed money on usurious interest, seeks relief in equity, he must do equity, and do what is right between the parties, which is the paying or tendering what is legally due.

APPEAL from the Court of Chancery. A bill was filed by *Wante* against the appellants, for the foreclosure of the equity of redemption in certain lands mortgaged by *Legoux* to *Wante*, by deed dated the 2d of November 1799, to secure the payment of \$5900, on the 1st of October 1805, and for other relief, &c. The answer of *Legoux* stated, that the mortgage was executed to secure the payment of money loaned at a usurious interest, and he pleaded and relied on the act of assembly passed on that subject. He afterwards, by his petition, prayed that the complainant answer certain interrogatories to be propounded to him, and among others the following—"4th. Did not the complainant press for the payment of his debt, and did he not afterwards consent to give time to the defendant, *Legoux*, to pay the same; if so, what time, and what sum did the complainant agree to give for the time? 5th. What rate of interest did the complainant demand for his money if he gave further time to pay the debt, and what rate of interest did the defendant finally agree to pay, &c. 6th. Did or did not *Legoux*, to secure the payment of the sum of money before mentioned as due from him on the 2d of October 1799, execute the deed of mortgage; was there any other consideration for that deed except the said debt, and what other consideration?" The complainant excepted to these interrogatories, and demurred generally to their being answered.

KILTY, Chancellor, (July 1808). The chancellor considers the principle of equity to be, that no person is bound to

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answer so as to subject himself to punishment; and not, as contended for the defendant, where the answering would create or occasion a forfeiture of his claim. In this case, the answer of the usury might subject him to a forfeiture or fine for the offence; and it has not been shown, by the counsel for the defendant, that it would not. It is certain that where the person who may have borrowed money on usurious interest seeks relief in equity, he must do equity, and do what is right between the parties, which is the paying or tendering what is legally due, but it is contended for the defendant that he does not bring the suit, or desire the interference of the court.

A decree was afterwards passed for a sale of the mortgaged premises, to satisfy the whole of the mortgaged debt. In that decree the chancellor stated, that the burthen of the proof of usury was on *Legoux*, and that it was not proved. That the complainant's counsel in the argument stated his willingness to take a decree for the principal and legal interest, on account of the insufficiency of the property; but the court could not found a decree upon such an offer, and therefore decreed for the whole sum. From this decree the defendants appealed to this court, where the cause was argued before CHASE, Ch. J. and POLK, and BUCHANAN, J. by

*Johnson*, (Attorney General,) for the Appellants; and by *Boyd and Moale*, for the Appellee.

DECREE AFFIRMED.

M'MECHAN'S LESSEE VS. GRUNDY & THORNBURGH. DECEMBER.

APPEAL from *Baltimore* County Court from a judgment rendered in favour of the defendant in that court, in an action of ejectment brought to recover the possession of a lot of ground in the city of *Baltimore*, described by metes and bounds. The general issue was pleaded.

Where a conveyance of a lot of ground from A B, (who had committed an act of bankruptcy,) to W M, was held not to be fraudulent, it having been made for a valuable consideration, and for

the purpose of substantially complying with an engagement of A B to I and J P, to transfer bank stock to them to secure them against any loss they might sustain by endorsing three promissory notes for his accommodation; and A B, not having bank stock, when applied to by I and J P, offered the lot of ground to them as a substitute, and at their instance sold and conveyed it to W M, who took up the said notes—That the preference acquired by I and J P was consequential and nothing more than a substantial fulfilment of the engagement made by A B to them, at the time of endorsing the notes.

To render a payment or transfer by a debtor to his creditor fraudulent as to the other creditors, under the bankrupt law, it must be spontaneously made in consequence of a formed design to become a bankrupt. Here the conveyance made by A B was not voluntary, but produced by the application of I and J P for a transfer of the bank stock, which they were entitled to, and the refusal of A B to comply with his engagement, or to make any provision to indemnify them, would have subjected him to an action at law, or bill in chancery, for a specific execution of his contract; and in that point of view the application of I and J P must be considered as importunate and pressing.

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1. At the trial the plaintiff below read in evidence a grant of *Todd's Range* to *James Todd*, on the 1st of June 1700, and proved that the premises, mentioned in the declaration, were part of that tract, and that *Aquila Brown* being seized and possessed of the said premises, did, on the 20th of February 1802, convey the same to *M<sup>c</sup>Mechen*, the lessor of the plaintiff, in consideration of the sum of \$14,050, by deed duly executed, acknowledged and recorded. He also offered evidence, that *I. and J. P. Pleasants* had previously to the 29th of December 1801, endorsed sundry notes for the accommodation of *Brown*, to the amount of \$16,000, none of which were then payable, and did not become payable till after the 20th of February ensuing; and that *Brown*, on the 29th of December 1801, applied to *I. and J. P. Pleasants* to endorse further and other notes for his accommodation, which they refused to do, unless *Brown* would secure them, by the conveyance of property, against any responsibility which they might incur by reason of such proposed endorsements; that *Brown* did then agree with *I. and J. P. Pleasants* to secure them, by the transfer of bank stock, against any responsibility which they might incur by reason of such endorsements to be made by them for the accommodation of *Brown*; that in pursuance of such engagements, *I. and J. P. Pleasants* did endorse for the accommodation of *Brown* three promissory notes, each for \$4,674, dated the 29th of December 1801, drawn by *Brown*, and payable to and endorsed by *I. and J. P. Pleasants*, one in 170 days, another in 180 days, and the other in 190 days; and that *Brown* did thereupon sign and deliver to *I. and J. P. Pleasants* the following receipt: "Received, December 29th, 1801, of *Israel and John P. Pleasants*, their three several endorsements of my notes for four thousand six hundred and seventy-four dollars each, making fourteen thousand dollars, which I promise to provide for and pay as they become due, say on the 17th and 27th of June, and 7th of July next; and as a security for the faithful performance thereof, I hereby engage to deposit bank stock to the amount in their hands.

*A. Brown, jr."*

That *Brown*, afterwards did negotiate, for his own use and accommodation, the said three notes so endorsed by *I. and J. P. Pleasants*, with a certain *E. Pannell*, and

that *I. and J. P. Pleasants* afterwards, on the 19th of February 1802, knowing *Brown* to be in difficult circumstances, called on him and requested him to secure them, in pursuance of his said engagement, against any responsibility which they might incur by reason of their said endorsements; and thereupon *Brown* having then no bank stock, offered to convey to them the premises mentioned in the declaration, for the purpose of indemnifying them as aforesaid, but which they did not accept. That the lessor of the plaintiff, on the 20th of February 1802, in order to assist *I. and J. P. Pleasants*, agreed with *Brown* and *I. and J. P. Pleasants*, that if *Brown* would sell and convey to him the property mentioned in the declaration for the amount of the said notes, that he would pay *Pannell* the amount of the said notes when due; and that *Brown*, in pursuance of his said undertaking to *I. and J. P. Pleasants*, and at their request, and in pursuance of the above mentioned agreement between the lessor of the plaintiff, *I. and J. P. Pleasants* and himself, did on the 20th of February 1802, sell and convey to the lessor of the plaintiff, by the deed herein before mentioned, the premises mentioned in the declaration; and that the lessor of the plaintiff did, at the respective periods at which the said three notes became due, pay the amount of them to *Pannell*, the holder; and that the premises mentioned in the declaration were not worth the amount of the said three notes, so paid by the lessor of the plaintiff. That *Brown's* affairs being desperate, and it being impossible for him to go on with his business, or pay his debts, he was, on the said days, and particularly on the 20th of February 1802, very fearful of being arrested by his creditors, or some of them, and took measures to avoid such arrest. The defendants then gave in evidence, that *Brown* was, on the 17th of February 1802, and long before, and from that day until the 22d of the same month, a merchant, residing in the city of *Baltimore*; that he was at the said times, and long before, a person actually using the trade of merchandise, by buying and selling in gross, and dealing in bills of exchange; and that he was on the 20th of February 1802, indebted to *N. Norris* above the sum of \$1,000 then due; that on that day *Norris* sued out of *Baltimore* county court a writ of *capias ad respondendum* against *Brown*, which writ was directed, and the same day delivered, to

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the sheriff of *Baltimore* county, to be served upon *Brown*; that the sheriff on the same day, at 4 o'clock in the afternoon, called at the dwelling-house of *Brown* to serve the writ, who concealed himself therein, and directed one of his clerks to inform the sheriff that he, *Brown*, was not at home, although he was at that time in his said house, and did deny himself for the purpose of preventing himself from being arrested upon the said writ. That *Brown* did, before the 20th of February 1802, declare that he had been advised to become a bankrupt, and that he was determined to become one. That on the 17th of February 1802, *Brown*, being indebted to *R L, J M, & R C*, in the sum of \$7000, on a protested bill of exchange drawn by him in their favour, and before that time protested for nonpayment, *R C* called on *Brown*, and urged him to pay or satisfy the said bill; and that *Brown* did therefore, for the purpose of discharging the said bill, execute and deliver to *R L* and *J M*, with the assent of *R C*, on the 17th of February 1802, a bill of sale of a Brig called *The Hurter*, then belonging to *Brown*. That on the 19th of February 1802, *Brown* and *J P*, being tenants in common of and in three tracts of land in *Anne-Arundel* county, containing 300 acres, *Brown* did, at the urgent request of *J P*, by deed duly executed and recorded, convey to *J P*, and his heirs, all his *Brown's* interest and estate in the said lands, in consideration of the sum of \$2000 about two years before that time expended by *J P* for *Brown* in the improvement of the said land, and in pursuance of an agreement so to convey, made by *Brown* with *J P* soon after the time of making the said improvement, and two years before the date of the deed. That all the said conveyances, including the deed to the lessor of the plaintiff, were made by *Brown* with a view to, and in contemplation of, an act of bankruptcy, stoppage of payment, and insolvency by him to be committed, and with intent to give to the several persons aforesaid, being a part of his creditors, a preference in payment of their debts, to the exclusion or injury of his other creditors; that the debts then due from him to the said persons, together amounted to \$23,000, the property so conveyed to \$16,000, the whole of his debts to all his creditors \$40,000, and the whole of his property and estate to about \$100,000. That *Brown* did actually stop payment on the 19th of February 1802,

and that one of his notes was duly protested for nonpayment on the 20th of the same month, in the afternoon. That on the 20th of February 1802, *N. Norris* presented to *J W*, then district judge of the *U. S.* in and for the district of *Maryland*, a petition stating that *Brown* had become bankrupt, &c. and praying the judge to grant unto him a commission of bankruptcy against *Brown*, &c. And did also, on the 22d of February 1802, make affidavit in writing of his debt, amounting to \$2356 39, &c. He also executed on the 22d of February 1802, and delivered to the judge, his bond as required by law. That on the 22d of February 1802, the judge did, by commission under his hand and seal, appoint *J C*, &c. to act as commissioners of *Brown*. That the commissioners, having taken the oath required, &c. did on the 22d of February 1802, proceed to execute the said commission, and cause reasonable notice in writing to be served on *Brown*, &c. That *Brown*, on the 23d of February 1802, in pursuance of the notice, appeared before the commissioners, and submitted himself to the commissioners, and did not require that any jury should be impannelled, &c. That the commissioners did, on the 23d of February 1802, on due examination and proof, adjudge and declare *Brown* a bankrupt. That the commissioners did immediately after they had adjudged and declared *Brown* bankrupt as aforesaid, cause due and sufficient notice to be given to *Brown's* creditors, and did in such notice appoint a convenient time and place for the said creditors to meet and prove their debts, and to choose assignees, &c. which notice was duly published, &c. That at the time and place specified in the said notice, the creditors of *Brown* proved their debts, and did then and there duly appoint the defendants, assignees of *Brown*. That the commissioners afterwards, on the 11th of March 1802, made, executed and delivered, a deed to the defendants, appointing them assignees, and conveying to them all and singular the goods, &c. of *Brown*, of which he was possessed, &c. The plaintiff then offered evidence, that it was previously to the 20th of February 1802, concerted between *Brown* and *Norris*, the petitioning creditor, that *Norris* should sue forth a writ of *capias ad respondendum* against *Brown*, and that *Brown* should keep his house so that he should not be taken or served with the writ, and that *Norris* should thereupon petition

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the district judge for a commission of bankruptcy against *Brown*; and that in pursuance of the said concerted agreement between *Norris* and *Brown*, *Norris* did sue forth the writ herein before mentioned against *Brown*, and that *Brown* did, in pursuance of the said agreement, keep his house at 4 o'clock, P. M. on the 20th of February 1802, so that he could not be served with the said process; and that *Norris* did, in further execution of the said concerted scheme, petition the district judge for a commission of bankruptcy, who issued the commission herein before mentioned; and that the commissioners appointed in and by the said commission, and herein before named, did declare *Brown* a bankrupt on account of his having so as aforesaid avoided the service of the said process. That on the 20th of February 1802, there was no debt due and payable from *Brown* to *Norris*. That the deed from *Brown* to the lessor of the plaintiff was executed and delivered to the lessor of the plaintiff on Saturday the 20th of February 1802, at 8 o'clock in the morning, and that *Brown* did not consent to commit an act of bankruptcy until the 19th of February 1802, in the evening, and then with reluctance, although persuaded or advised so to do by some of his friends, and that he did not refuse to pay any of his creditors their respective debts until the 20th of February 1802. The county court, [*Nicholson* Ch. J.] upon the prayer of the defendants, directed the jury, that if they believed from the testimony in the cause that *Brown* had agreed, on the 19th of February 1802, with his friends, to deny himself to the sheriff for the purpose of committing an act of bankruptcy, thereby to lay a foundation for a commission of bankruptcy; that he did so deny himself on the 20th; that a commission issued in pursuance thereof, and that he was declared a bankrupt; that the deed from him to the lessor of the plaintiff was executed on the 20th of February, after he had formed this resolution, with a view solely to secure the *Pleasants* against any responsibility which they might afterwards incur on account of their endorsements for *Brown's* use; and that the lessor of the plaintiff accepted the said deed, and agreed to take up *Brown's* notes endorsed by the *Pleasants*, when they became payable, with the same view of relieving the *Pleasants* from their future responsibility, and to secure them against any loss which they might sustain in consequence of the

derangements of *Brown's* business, then the said deed is not a *bona fide* purchase in the purview of the tenth section of the act of congress, but must be considered fraudulent in point of law, by giving a preference to certain persons, who might possibly afterwards become creditors, in exclusion of other creditors, if the jury believe that *Brown* had other creditors to a considerably larger amount than his funds. And inasmuch as the deed was a fraudulent conveyance, made in contemplation of, and with a determination to commit an act of bankruptcy, it is void, and is in itself an act of bankruptcy, and will support the commission and adjudication of the commissioners, although the act, upon which the commission issued, was subsequent to the execution of the deed, but upon the same day, and although the said act might not have been an act of bankruptcy. The deed to the lessor of the plaintiff being void, he cannot recover in this cause, as he has shown no other title than that derived from *Brown*, which did not pass, by reason of the fraud upon *Brown's* other creditors. The plaintiff excepted.

2. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if the jury shall be of opinion from the evidence, that *Brown* was, on the 20th of February 1802, seized of the premises mentioned in the declaration, and being so seized did on that day convey the same to the lessor of the plaintiff by deed duly executed, acknowledged and recorded, for a fair and full price, and that the said deed was executed and delivered to the lessor of the plaintiff by *Brown*, before the act of bankruptcy committed by *Brown*, on which the commission of bankruptcy against him issued, and that the lessor of the plaintiff had no knowledge, information or notice, of any act of bankruptcy committed by *Brown* at the time of the execution and delivery of said deed, that then and in that case the plaintiff is entitled to recover. This opinion and direction the court refused to give. The plaintiff excepted. The verdict and judgment being for the defendants, the plaintiff appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, and EARLE, J.

*Martin* and *W. Dorsey*, for the Appellant, contended,

1. That the conveyance from *Brown* to the lessor of the

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*McMechon*  
vs  
*Grandy, &c.*

1810.

*M'Mechen*  
vs  
*Grundy, &c.*

plaintiff could not be deemed a voluntary preference on the part of *Brown*; and if it was not voluntary, it was not fraudulent. And 2. That if it was made in contemplation of bankruptcy, and to give a preference, still it was not by that circumstance void, because it was made on the pressing application of creditors. They referred to the act of congress, to establish an uniform system of bankruptcy, passed on the 4th of April 1800, ch. 19. *Phoenix vs. Ingraham's assignees*, 5 Johns. Rep. 412. *Hartshorn vs. Stodden*, 2 Bos. & Pull. 582. *Ex Parte Scudamore*, 3 Ves. 85. *Worseley vs. De Mattos*, 1 Burr. 467, 480. *Harman vs. Fishar*, 1 Cowp. 117. *Small vs. Dudley*, 2 P. Wms. 427. *Rust vs. Cooper*, 2 Cowp. 629. *Hooper vs. Smith*, 1 W. Blk. Rep. 441. *Thompson vs. Freeman*, 1 T. R. 156, (note.) *Smith vs. Payne*, 6 T. Rep. 152. *Yeates vs. Groves*, 1 Ves. jr. 280. *Hopkins vs. Grey*, 7 Mod. 139. *Cock vs. Goodfellow*, 10 Mod. 489, 497; and *Smith vs. Hodson*, 4 T. R. 211, 212.

*Harper* argued for the Appellees.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion; that the conveyance from *Aquila Brown* to *William M'Mechen*, the lessor of the plaintiff, is not fraudulent, the same having been made for a valuable consideration, and for the purpose of substantially complying with the engagement of *Brown* to the Messrs. *Pleasants*, to transfer or deposit bank stock with them, to secure them against any loss they might sustain by endorsing the three notes. As *Brown* could not comply with his engagement to transfer or deposit bank stock with the Messrs. *Pleasants*, when applied to by them, and as *Brown* offered to convey the house and lot to them as a substitute for the bank stock, and inasmuch as the conveyance was made to *M'Mechen*, with the concurrence of all the parties then concerned, on his engaging to take up the notes, the preference acquired by the Messrs. *Pleasants* was consequential, and nothing more than a substantial fulfilment of the engagement made by *Brown* to them at the time of endorsing the notes.

The court are of opinion, that to render a payment or transfer by a debtor to his creditor, fraudulent as to the other creditors, under the bankrupt law, it must be spontaneously made in consequence of a formed design to be-

come a bankrupt. In this case the conveyance made by *Brown* was not voluntary, but produced by the application of the Messrs. *Pleasants* for a transfer of bank stock, which they were entitled to, and the refusal of *Brown* to comply with his engagement, or to make any provision to indemnify them, would have subjected him to an action at law, or bill in chancery for a specific execution of his contract, and in that point of view the application of the Messrs. *Pleasants* must be considered as importunate and pressing.

The court reverse the judgment of the court below, this court dissenting from the opinions expressed in both of the bills of exceptions, and awarded a *procedendo*.

JUDGMENT REVERSED, &c.

M'Evoy, et al. vs. THE MAYOR, &c. OF BALTIMORE. DECEMBER.

APPEAL from *Baltimore County Court*. This was an action of debt, brought in the name of *The Mayor and City Council of Baltimore*, at the instance and for the use of *The Trustees of the Roman Catholic Church, in the Town of Baltimore*, against the defendants, (now appellants.) The facts as agreed upon were these: It is admitted that the bond stated in the declaration was duly executed by the defendants to the plaintiffs, on the 7th of December 1802, reciting, that "whereas the above bound *James M'Evoy* hath obtained from the mayor of the city of *Baltimore* a license of admission to use and execute the office and employment of a broker within the city of *Baltimore*. Now the condition of this obligation is such, that if the above bound *James M'Evoy*, do and shall well and faithfully execute and perform the office and employment of a broker, between party and party, without fraud, collusion, imposition, or any crafty or corrupt devices, and do and shall faithfully execute every trust committed to him as broker, then this obligation to be void," &c. The bond was thus endorsed: "Approved Decr. 7, 1802. *Jas. Calhoun*, Mayor," &c. It is admitted that the said *James M'Evoy* received the tickets expressed in the following receipt, viz. "Balto. Sepr. 12, 1803. Recd. of *Fras. Beeston*, one hundred tickets to the *Roman Catholic Cathedral Church Lottery*, numbered from No. 10601 to 10700;

In a debt on a bond given by a broker in the city of *Baltimore*. The replication to the plea of general performance, set out the ordinance for the admission and regulation of brokers; also the appointment of the broker, &c. & the act incorporating the *Roman Catholic Congregation*, at whose instance and for whose use, the action was brought. Also the act authorising a lottery for the benefit of the congregation, and the delivery to the Broker of 100 lottery tickets in the lottery, amounting to \$1000, to be sold by him for the benefit of the congregation. *Breach*, that he sold the tickets, and did not account therefor. The defendants rejoined payment, and on the trial, it was admitted that after the tickets had been sold, the Broker gave a promissory note to the agent of the congregation for the amount due, and the agent gave the Broker a receipt for the note, expressing that the note when paid, should be considered as a full payment of the money due for the tickets; and that the note had not been paid. Held, that the plaintiffs might recover in this action.

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both included; for which I promise to be accountable. *James M'Evoy*, Broker." That the said *M'Evoy* sold the said tickets before the 8th of October 1804, for the sum of \$1000. That after the said tickets had thus been sold, the said *James M'Evoy* gave the following promissory note for the payment of the said sum of money. "\$1000. *Baltimore*, Octo. 8, 1804. Thirty days after date, I promise to pay the *Revd. Francis Beeston*, or order, one thousand dollars, for value received. *James M'Evoy*." That at the time of receiving the said promissory note the said *Francis Beeston*, who was the agent of the said *Trustees of the said Roman Catholic Church*, gave to *James M'Evoy* a receipt for the said note, expressing that the said note, when paid, should be considered as a full payment of the money received for the said tickets; and that the said promissory note hath not been paid. The county court gave judgment for the plaintiffs. From that judgment the defendants appealed to this Court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, GANTT, and EARLE, J.

*Winder*, for the Appellants, contended, that taking the promissory note released the bond entered into as broker. That it was an indulgence granted to the principal in the bond, by which the sureties were released. He also contended, that the act of 1796, *ch. 68*, incorporating the city of *Baltimore*, did not take in the case of brokers, so as to entitle any person to recover on their bonds.

*Harper*, for the Appellees.

JUDGMENT AFFIRMED.

DECEMBER.

KENNEDY VS. M'FADON &amp; CATON.

A and B, with other persons since deceased, had been engaged, as copartners, in certain proportions, in many

mercantile adventures and speculations, which continued for several years, of which no liquidation or settlement between them had taken place; and among which they were joint owners, in the said proportions, of a brig and cargo, which were captured, and by decree of the Vice-Admiralty court, were restored free from salvage; but an appeal being interposed by the captors, it was necessary, in order to retain the property for the owners, to give security to abide the final decree on the appeal, and O and P became sureties for them. The vessel and cargo returned, and came to the possession of B, and the other partners, who disposed of the same. After which the sentence of the Vice-Admiralty court was reversed and it was decreed that salvage should be paid, and it was paid by O and P, who brought suit against A and B, and the other partners, and obtained judgment, which was paid by A, he being the only solvent partner, the others having been declared bankrupts. A brought an action of *assumpsit* against B, who had survived the other partners, to recover of him the proportion which he ought in justice and equity to contribute,—*Held*, that A was not entitled to recover in such action.

APPEAL from *Baltimore County Court*. This was an action of *assumpsit* for money had and received; for money laid out and expended; for money lent and advanced; for

work and labour as an agent, &c. and a *quantum meruit* for work and labour, &c. brought by the plaintiff, (now appellant,) against the defendants, as surviving partners of *William M. Faddon, & Co.* The general issue was pleaded; and at the trial the plaintiff offered in evidence, that the defendants, and a certain *William M. Faddon*, now deceased, and a certain *Richard Lawson*, also deceased, together with the plaintiff and *Henry Child, Howell Price* and *Richard Price*, were the joint owners and proprietors of the brig called *The Betsy*, and her cargo, in the following proportions, to wit: *Richard Caton* one-fourth part; *John M. Faddon* and *Richard Lawson*, now deceased, as copartners in trade under the firm of *John M. Faddon, & Co.* one-fourth part; *William M. Faddon*, now deceased, *Richard Lawson*, also deceased, and the aforesaid *John M. Faddon*, as copartners in trade under the firm of *William M. Faddon, & Co.* one other fourth part; *Henry Child, Howell Price* and *Richard Price*, as copartners in trade under the firm of *Child, Price, & Co.* one-eighth part; and the plaintiff the remaining eighth part. The plaintiff also offered evidence, that the said brig *Betsy*, and her cargo, owned as aforesaid, sailed from the port of *Baltimore* on a voyage to the Island of *St. Domingo*, where the plaintiff then resided, and to whom the said vessel and cargo were consigned for sale and disposal on their arrival; that in the prosecution of the above mentioned voyage, the vessel and cargo were captured and seized as prize, by a privateer commissioned and authorised to cruise by the *French* government; that they remained in the possession of the captors for a few days, until they were recaptured by an *English* ship of war, and afterwards carried into *Kingston*, in the Island of *Jamaica*; that immediately thereafter proceedings were instituted in the vice-admiralty court established in that island, and were continued, until by a final decree of the said court, the said vessel and cargo were restored to the above named proprietors thereof, free from and exonerated of the claim of salvage made by the recaptors; that the recaptors interposed an appeal from the sentence of the vice-admiralty court, and prayed that the same might be brought before the lords commissioners of appeals in prize causes in *Great-Britain*, and the appeal was accordingly allowed, and the property so liberated ordered to be restored to the proprietors, or

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their agents claiming on their behalf, on giving security to abide the final decree of the lords commissioners of appeals. The plaintiff also offered in evidence, that *John Campbell* and *Francis Whittle*, of the Island of *Jamaica*, at the instance and request of the above mentioned owners, became the security in the stipulation so as aforesaid awarded to be given by the said owners on the restoration of the *Betsy* and her cargo. That the vessel and cargo were afterwards sent to the port of *Baltimore*, and came to the hands and possession of *Richard Caton*, and the said *John M'Fadon* and *Richard Lawson*, now deceased, who disposed of the same. That the sentence and proceedings of the vice admiralty court in *Jamaica* were afterwards reversed by the lords commissioners of appeals, and a decree was by them made that salvage should be paid to the recaptors, out of the brig and cargo, to the amount of \$15,000. That *Campbell* and *Whittle* were compelled to pay to the recaptors, in consequence of their having become security in manner above mentioned, the said sum of money, being the amount awarded as salvage. That *Campbell* and *Whittle*, after having paid the last mentioned sum of money, remitted an account thereof to the above named owners, requesting the reimbursement of the sum they had thus been compelled to pay in consequence of their having become security; that not being able to obtain the payment of the said sum of money, they instituted a suit in the circuit court of the *United States* for the *Maryland* district, against the above named owners, and obtained a judgment thereon; that in the interval between the payment of the moneys by *Campbell* and *Whittle*, for the decree of salvage before recited, and the institution of the suit by *Campbell* and *Whittle*, for the recovery of the said sum of money, the defendants, *Richard Caton* and *John M'Fadon*, became bankrupts, within the view and meaning of the law of the *United States*, then existing on that subject, and obtained a regular certificate of discharge of all debts due by them antecedent to the act of bankruptcy on which the commissions issued, by which they were respectively declared bankrupts; that the plaintiff, in pursuance of the said judgment, being the only solvent person of the owners above named, paid and satisfied the whole amount of the said judgment; and that the present suit is brought for the recovery of the proportion of the said money which the de-

defendants ought in justice and equity to contribute. He further offered in evidence to the jury, that there was nothing due from him to the defendants on account of their joint adventure in the said brig and cargo. The defendants then offered in evidence, that at the time of the sailing and capture of the brig *Betsy*, they, with the plaintiff, and the other owners above mentioned, were engaged as copartners in the above mentioned proportions, in many other mercantile adventures and speculations, which continued for several years; that on the whole of these speculations and adventures, the defendants have always claimed, and still do claim, a considerable balance to be due to them from the plaintiff, and that no liquidation or settlement between the said joint owners, or any of them, hath yet taken place of the said speculations, adventures and claim, or of the business of the brig *Betsy*, her cargo, capture or salvage aforesaid. The defendants then, by their counsel, prayed the opinion of the court, and their direction to the jury, that if they believe all the matters so offered in evidence by the plaintiff and defendants, the plaintiff is not entitled in law to recover in this action. Of which opinion was the court, [*Nicholson*, Ch. J. and *Hollingsworth*, A. J.] and so directed the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, GANTT, and EARLE, J.

*Martin*, for the Appellant.

*Harper* and *Winder*, for the Appellees. They argued that the plaintiff and defendants were partners, and that one partner could not sue another in a court of common law, where there was no liquidated balance ascertained to be due.

THE COURT concurred with the County Court in the opinion in the bill of exceptions.

GANTT, J. dissented.

JUDGMENT AFFIRMED.

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1810.

THE BALTIMORE INSURANCE COMPANY VS. TAYLOR.

DECEMBER.

APPEAL from *Baltimore County Court*. Covenant on a

The Baltimore  
Insurance Com'y.  
vs  
Taylor

Covenant on an open policy of insurance on a cargo, where the vessel and cargo were condemned on account of contraband trade. Neither the insurers nor insured knew of the contraband article, it having been put on board secretly by the captain, nor was there any representation to the insurers that either vessel or cargo were neutral, nor a warranty to that effect—*Held*, by *Baltimore county court*, *Nicholson*, Ch. J. that as the interest of the insured was proved to exceed the amount insured, he was entitled to recover against the underwriters.

policy of insurance on the cargo of a vessel which was captured, and the cargo condemned as being contraband of war. Evidence was given at the trial that a quantity of tin and shot were shipped on board the vessel by the captain, which were not mentioned in any of the ship's papers, or documented in any manner; that it was on board when the vessel was captured, and that its being on board was not communicated to the defendants, (the appellants,) before or at the time of executing the policy; also, that the plaintiff, (the appellee,) had no knowledge of it, it being concealed from him by the captain.

*Nicholson*, Ch. J. directed the jury, that as it was an open policy, in which the assured could only recover according to the value of his interest, and as his interest was proved and admitted greatly to exceed the amount insured, the warranty could not be extended by implication beyond the interest. If the tin and shot had been the property of the plaintiff, then being a part of the interest insured, it would have been embraced by the warranty; or if they had been put on board with the plaintiff's knowledge, then it would have been his duty to have had them regularly documented, and for his neglect in this respect the policy might have been vitiated; being put on board, however, by the captain, with a fraudulent view, he was guilty of barratry, and this barratry, altho' possibly the remote cause of the loss, cannot exonerate the underwriters. Neither can they be excused by any alleged misrepresentation or concealment of facts. The representation, which was the foundation of the policy, does not state either vessel or cargo to be neutral; and if the insurers intended that no property should be put on board, but such as was neutral, they should have insisted on a representation to that effect, or should have included it expressly in the warranty. The defendants excepted, and appealed to this court, but at this term they *dismissed* their appeal.

APPEAL DISMISSED.

NORWOOD VS. MARTIN.

1810.

DECEMBER.

ERROR to *Baltimore County Court*, issued on the 30th of May 1810, for the removal of a judgment rendered in that court at March term 1810, for \$334 debt, \$500 damages, and \$7 93½ costs. The damages by (agreement,) to be released on payment of interest on the debt from the 1st of January 1809. A record of the proceedings was transmitted to this court to June term last, with the writ of error, endorsed, "Bond filed, and securities approved."

Norwood  
vs.  
Martin

The plaintiff in error entered into bond with sureties, to the defendant in error, (which was approved by the chancellor) for the removal of a judgment from the county court to the court of appeals; but as the bond was not in double the amount of the debt, &c. recovered, the defendant in error sued out a *ca. sa.* on the judgment, under which the plaintiff in error was taken in execution, who petitioned to, and moved the court of appeals for a writ of *habeas corpus* to discharge him from the execution—*Held*, that the writ of *habeas corpus* could not issue

*T. Buchanan*, for the Plaintiff in error, at this term, exhibited a petition on the part of the plaintiff in error, stating that he had on the 30th of May 1810, entered into bond with sureties, approved by the chancellor, for prosecuting a writ of error on the judgment rendered against him in *Baltimore county court*, at the suit of the defendant in error, a copy of which bond he exhibited, being in the penal sum of \$800, and in the usual form. That a transcript of the record of said judgment had been transmitted to, and was now depending in this court. That on the 29th of November 1810, the defendant in error sued out a writ of *capias ad satisfaciendum* on the judgment from *Baltimore county court*, under which the plaintiff in error had been arrested, and was in custody of the sheriff of that county under the said pretended execution; from which he prayed to be discharged, &c.

And on the motion of the counsel of the plaintiff in error, it was ruled by the court, that the defendant in error show cause, by Friday the 4th of December instant, why a writ of *habeas corpus* should not issue to the sheriff of *Baltimore county*, to produce the body of the plaintiff in error before this court, &c.

*Martin*, in person, now showed cause. He contended, that as the penalty in the writ of error bond was not in double the amount of the debt, damages and costs, the writ of error did not operate as a *supersedeas*. He referred to the act of 1713, *ch.* 4. The approval by the chancellor was only as to the security, and has nothing to do with the form of the bond. He also contended, that as the petitioner, (as was the case,) was then present in court, and not in the actual custody of the sheriff of *Bal-*

1811.

West  
vs  
Hyland

*timore county*, he was not entitled to a writ of *habeas corpus*. He referred to 3 *Bac. Ab. tit Habeas Corpus*, (B 3) 427. *Rex vs. Kessel*, 1 *Burr.* 637 He further insisted that this court, as a court of appeals, had no authority to issue the writ. It can only be issued, if at all, by the court out of which the *ca. sa.* issued, or by a member of this court out of court.

RULE DISCHARGED.

JUNE (E. S.)

WEST'S EX'X. VS. HYLAND.

Where a *ca. sa.* is returned *cepi*, and the plaintiff does not proceed to enforce the writ by having the defendant committed, defaulting the sheriff, or having it entered not called, it does not preclude the plaintiff from taking out a new *ca. sa.*

THIS was a *ca. sa.* issued on a judgment affirmed in this court on an appeal from *Somerset County Court*. The defendant was taken in execution under this *ca. sa.* and appeared in court in the custody of the sheriff.

*J. Bayly*, for the Defendant, moved the court for a rule on the plaintiff to show cause why the writ of *ca. sa.* in this case ought not to be quashed, upon the ground that the defendant had been taken in execution under a *ca. sa.* issued by the plaintiff upon the same judgment, returnable to the last term of this court, which *ca. sa.* was returned by the sheriff, endorsed *cepi*, and to which the defendant appeared in this court at the return day of the writ, but the plaintiff did not move the court to have the defendant committed, nor did he call on the sheriff to bring into court the body of the defendant, nor did he do any thing therein, but that *ca. sa.* stands open upon the docket of the court under the sheriff's return of *cepi*, and the present *ca. sa.* is a renewal of the said former writ. He contended, that the defendant was released from the debt, by the plaintiff's neglect to enforce the former *ca. sa.* by defaulting the sheriff, committing the defendant to the custody of the sheriff, or having the *ca. sa.* entered *not called* with the consent of the defendant; and that he could not be again taken in execution under a new *ca. sa.* whilst the former stood under a *cepi*, and not acted upon.

*Martin*, and *W. B. Martin*, against the rule.

CHASE. Ch. J. delivered the opinion of the court to the following effect (a.) That the return of *cepi* to the former

(a) BUCHANAN, NICHOLSON and EARLE, J. concurred.

*ca. sa.* and the plaintiff not proceeding to enforce that writ by having the defendant committed, defaulting the sheriff, or an entry of not called, did not preclude the plaintiff from again taking out a new *ca. sa.*

1811.

Walters  
vs  
Walters

RULE REFUSED.

WALTERS *et al.* vs. WALTERS.

JUNE (E. S.)

APPEAL from Queen-Anne's County Court. This was an action of ejectment, brought by the plaintiff below, (now appellant,) to recover a tract of land called *Dundee*. The defendant (now appellee,) took defence on warrant, and plots were made. At the trial the plaintiff read in evidence a patent for the tract of land called *Dundee*, granted to *Robert Walters* on the 18th of March 1746. He also read in evidence a copy, under seal, of the will of *Robert Walters*, the patentee of the said land, dated the 14th of January, 1763. The parts of the will which are material are these: "*and as for my worldly goods which it hath pleased God to bless me with in this life, I give and dispose of in the following manner and form: Item. I give and bequeath to my son John Walters, all that part of a tract of land called Dundee, whereon I now dwell, according to the division which I have already marked. I likewise give and bequeath unto my aforesaid son John Walters, one negro boy named Limus, and one negro girl named Phillis. Item. I give and bequeath unto my son Benjamin Walters, all the remaining part of the aforesaid tract of land called Dundee that lyeth on the north side of the main road that leads from the narrows of Kent Island to church. I likewise give and bequeath unto my aforesaid son Benjamin Walters, one negro woman named Rumsey, one mulatto girl named Grace, one negro girl named Sue, all the cattle, all the household furniture, and half the hogs on the plantation where he now lives, all which he has in possession. Item. I give and bequeath unto my grandson Robert Walters, all that part of a tract of land called Dundee. that lyeth on the*

"*and if she dies without heirs lawfully begotten, then I give the aforesaid negro to my grandson A W.*" He also bequeathed certain slaves to his wife during her natural life, and after her death, then to, &c. and then concludes "*after all my just debts, legacies, wife's thirds, and funeral charges are paid, the remainder of my estate I give and bequeath unto my son J W.*"—Held, that J W, the son of the testator, took only an estate for life; and that the residuary devise could not be construed to pass any part of the real estate; therefore, that the reversion in fee in the land called D, not being disposed of by will, descended to the heir at law.

1811.

Walters  
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south side of the main road that leads from the narrows of *Kent Island* to the church on *Kent Island*. I likewise give and bequeath unto my grandson *Robert Walters* aforesaid, one tract of land called *Walters' Addition to Kirby's Prevention*, laying on *Kent Island* in *Queen Anne's* county; my aforesaid grandson *Robert Walters* not to inherit his lands aforesaid until the death of his father *Alexander Walters*; and my will is, that my son *Alexander* inherit the lands aforesaid, until\* the benefits of them during his natural life. Item. I give and bequeath unto my son *James Walters*, one tract of land called *Jamaica*, and fifty acres of land, part of a tract of land called *Hope*, both adjoining, laying on a branch of *Hamilton's* creek in *Chester Forest*, *Queen-Anne's* county, both which tracts of land, and part of a tract, I give unto my aforesaid son *James Walters*. Item. I give and bequeath unto my three granddaughters, daughters to my son *James Walters*, namely *Ruth*, *Mary* and *Ann Walters*, one negro woman named *Dinah*, and all her increase, to be equally divided among them at the death of their father *James Walters*, the said *James Walters* to have the use of the aforesaid negro, and increase, during his natural life. Item. I give and bequeath unto my grandson *Jacob Walters*, son to *James Walters*, one negro boy named *Sam*. Item. I give and bequeath unto my granddaughter *Anne Blunt*, one negro boy named *Cæsar*. Item. I give and bequeath unto my granddaughter *Susanna Walters*, daughter to my son *Alexander*, one negro girl named *Moll*; and if she dies without heirs lawfully begotten, then I give the aforesaid negro *Moll* to my grandson *Alexander Walters*. Item. I give and bequeath unto my daughter *Susanna Luthram*, one negro woman named *Dinah*, and all her increase, which negro and increase she has in possession. Item. I give unto my daughter *Rachel Kirby*, one negro woman named *Murreus*, and all her increase, to be equally divided among her children, which negro and increase she has in possession. Item. I give and bequeath unto my son *Jacob Walters*, one negro man named *Jo*, to be delivered to him at the death of his mother *Elizabeth Walters*. Item. I give unto my aforesaid son *James Walters*, one good feather bed and furniture, and one oak desk. Item. It is my will that my dearly beloved wife, *Elizabeth Walters*, have the use of the four following negroes during her natural life; that

\*Probably and.

is to say, *Jo, Phillis, Darkey and Daphney*, which said four negroes *I will my wife during her natural life, and after her decease, then I give and bequeath the aforesaid four negroes unto the persons hereafter mentioned; that is to say, Phillis to my son Benjamin Walters, Joe to my son Jacob Walters, and Daphney to my son Alexander Walters, and Darkey to my granddaughter Anne Walters, daughter to James Walters.* Item. After all my just debts, legacies, wife's thirds and funeral charges, is paid and discharged, the remainder of my estate I give and bequeath unto my son *John Walters*. Lastly. I constitute, make and ordain, my dearly beloved wife *Elizabeth Walters*, executrix, and my son *John Walters* executor, of this my last will and testament, utterly revoking all other wills heretofore made by me, ratifying and confirming this, and none other, to be my last will and testament, in the presence of us whose names are here subscribed." The will was duly executed and proved. The plaintiff then proved, that *Alexander Walters* was the eldest son and heir at law of *Robert Walters*, the patentee and testator; and proved a regular descent down from *Robert Walters*, the patentee and testator, and from *Alexander*, his eldest son and heir at law, to the lessors of the plaintiff. The defendant then proved that *John Walters*, the son of *Robert*, the patentee and testator, mentioned in the said will, was the father of *John Walters*, the defendant; and that at the death of *Robert*, the patentee and testator, *John*, his son and devisee under the will, entered on the lands mentioned in the declaration, and was possessed thereof until his death, which happened in the year 1796, when the defendant, his son, entered into the said lands, and was and is now possessed thereof. The plaintiff then moved the court to instruct the jury, that by the will of *Robert Walters*, the patentee and testator, the fee simple to the lands mentioned in the declaration, and devised as aforesaid to *John Walters*, did not pass the said *John Walters*, the son of the said *Robert Walters*, the testator, and that the fee simple in the said lands has not been disposed of by the said testator by any part of his will, consequently that the same descended to *Alexander Walters*, the son and heir at law; and the same having been regularly transmitted down to the lessors of the plaintiff, the plaintiff is entitled to recover. But the court being divided in opinion, no direction was

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given to the jury. The plaintiff excepted; and the verdict and judgment being against him, he brought the present appeal.

The cause was argued in this court before CHASE, Ch. J. and POLK, BUCHANAN, NICHOLSON, EARLE, and JOHNSON, J.

*Martin and Bullitt*, for the Appellant, upon the first question, as to what estate passed to *John Walters* in *Dundee*, cited *Hogan vs. Jackson*, Cowp. 306. *Bowes vs. Blackett*, *Ibid* 238. *Loveacres vs. Bright*, *Ibid* 355. *Denn vs. Gaskin*, *Ibid* 657, 661. *Roe vs. Bolton*, 2 Blk. Rep. 1045. *Right vs. Sidebotham*, Doug. 759, 761. *Doe vs. Wright*, 8 T. R. 64; and *Doe vs. Allen*, *Ibid* 497.

Upon the second question, whether *John Walters* took the reversion under the residuary clause? they cited *Time-well vs. Perkins*, 2 Atk. 102. *Roe vs. Avis et al.* 4 T. R. 605. *Markant vs. Twisden*, 1 Eq. Ab. 211, 212. *Doe vs. Buckner*, 6 T. R. 610; and *Canfield vs. Gilbert*, 3 East, 516.

*Carmichael and Harrison*, for the Appellee, upon the first question, cited *Hardacre vs. Nash*, 5 T. R. 716. *Gilb. Dev.* 17. *Baddely vs. Leppingwell*, 3 Burr. 1533. *Evans vs. Astley*, *Ibid* 1682. *Winchester vs. Tilghman*, 1 Harr. & M'Hen. 452. 2 *Fearne* 4. *Frogmorton vs. Holyday*, 3 Burr. 1618. *Oates vs. Cooke*, *Ibid* 1686. *Loveacres vs. Blight*, Cowp. 352. *Denn vs. Gaskin*, *Ibid* 657; and *Right vs. Sidebotham*, Doug. 759.

Upon the second question, they cited *Holdfast vs. Marten*, 1. T. R. 411, 414. *Bridgewater's case*, 6 Mod. 106. *Co. Litt.* 144. b. *Roe vs. Avis, et al.* 4 T. R. 605. *Gilb. Dev.* 22. *Doe vs. Buckner*, 6 T. R. 610. *Trott vs. Vernon*, 2 Vern. 708. *Hardacre vs. Nash*, 5 T. R. 716; and the act of 1729, ch. 24, s. 10.

CHASE, Ch. J. delivered the following opinion, which was concurred in by the other judges. I am of opinion that *John Walters*, under the will of his father *Robert Walters*, took only an estate for life in the lands in question. The devise to *John* is general, without words of limitation or perpetuity, and there are no words in the will connected with the devise to *John*, or relating to the

subject matter of it, denoting an intention in the testator to create a greater estate than for life. The introductory clause, although it manifests an intention in the testator to dispose of the whole of his estate, and not to die intestate as to any part, is not so connected with the devise in question to *John*, as to enlarge the estate for life into an estate of inheritance; and the rule of law is too firmly established to be shaken, that a general devise, without words of limitation or words equipollent or tantamount, will not pass a greater estate than for the life of the devisee. In expounding wills the intention of the testator is the polar star, and must prevail, if consistent with the rules of law, and that intention must be collected from the words of the will, which are applicable to the devise under consideration. The intention of the testator inferable, or to be conjectured by the court in this case, from a general view of his will and the circumstances of his family, cannot be effectuated, because it stands opposed by the rule of law just mentioned, and because there are no words in the will, connected with the devise under discussion, indicating an intention to enlarge the estate for life.

As to the residuary clause, the words "all the remainder of my estate," are full and comprehensive enough to pass the whole of his estate, real and personal, remaining, to his son, *John Walters*, if the generality of these words are not restricted by the antecedent words in such manner as to confine them to the personal estate. In deciding on the operation and effect of these words, the court must consider the whole of the will, for the purpose of ascertaining the intention of the testator. In the introductory clause the testator manifests an intention of disposing of his whole estate, and he does it most effectually if these words are taken in their most comprehensive sense. He devises both real and personal estate, and has given a great many legacies; but it is contended that these words, being connected with the preceding words, "after all my just debts, legacies, wife's thirds, and funeral charges, are paid and discharged"—[We regret that the remaining part of the opinion of the court has been mislaid. But the result of it was, that the general residuary devise to *John Walters*, when taken in connexion with the other parts of the will, was to be confined to the testator's personal estate.]

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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**Fitzhugh  
vs  
Helen**

The return of a sheriff to a writ of attachment on warrant was, that he had attached of the goods, &c. of the defendant, "his life estate in all the lands got by his wife, supposed to be 450 acres"—Held, that the return was defective in not describing with sufficient certainty the land attached, so as to lay a legal foundation for a judgment of condemnation.

FITZHUGH VS. HELLEN.

**ERROR to Calvert County Court.** On the 7th of May 1807, a writ of attachment on warrant, under the act of 1795, *ch.* 56, was issued by the defendant in error, (the plaintiff below,) against the goods and chattels, lands and tenements, of the plaintiff in error, (the defendant below;) the writ was returned by the sheriff, "attached as per schedule." In the schedule, among other property of the defendant below, included therein and appraised, was "his life estate in all the lands got by his wife, supposed to be 450 acres, at 18s 9d per acre, £414 7 6." The defendant not appearing, judgment of condemnation was entered for the whole of the property included in the schedule, towards satisfying the plaintiff's claim. To reverse that judgment the present writ of error was brought.

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, and EARLE, J. by

*T. Buchanan* and *Magruder*, for the Plaintiff in error (a); and by

*Taney*, for the Defendant in error.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that the return of the sheriff to the writ of attachment, is defective in not describing with sufficient certainty the land attached, so as to lay a legal foundation for the judgment of condemnation.

JUDGMENT REVERSED.

(a) They referred to *Williamson vs. Perkins*, 1 *Harr. & Johns.* 449.

JUNE.

D'ANJOU &amp; BALL VS. DEAGLE.

In an action against a common carrier, where the plaintiffs directed J L to barter certain chairs for a bale of handkerchiefs, and ship them on board the *Norfolk* packet, to be transported to the plaintiffs, J L had a bale of handkerchiefs delivered on board the packet to the cabin boy, in order that it might be carried to *Norfolk*, and there delivered to the plaintiffs; but it never was delivered to the plaintiffs, and they retained certain moneys of J L in their hands, arising from the sale of butter consigned to them, to the amount of the price of the bale of handkerchiefs, as and for satisfaction. Evidence was given that the recovery in this cause was to be for the use of J L.—Held, that the action could be sustained.

**APPEAL from Baltimore County Court.** This was an action on the case against the defendant, (now appellee,) as a common carrier of goods and chattels from *Baltimore* to *Norfolk*, for negligence, &c. The general issue was pleaded. At the trial the plaintiffs, (now appellants,) gave in evidence, that the defendant, on the 20th of April 1803, and before and afterwards, was the proprietor and

the defendant, on the 20th of April 1803, and before and afterwards, was the proprietor and

owner of a packet or vessel, which he employed in carrying and transporting passengers and merchandise from the port of *Baltimore* to the port of *Norfolk* in *Virginia*, and thence back to *Baltimore*, for hire and reward. That the plaintiffs had directed *J. and R. K. Lowry* of *Baltimore*, to barter certain chairs of the plaintiffs for a bale of Mad-rass handkerchiefs of the value of \$200, and to ship the same for their account and risk, on board the said packet, in order to be transported to *Norfolk*, and there delivered to the plaintiffs. That *J. & R. K. Lowry*, pursuant to the instructions of the plaintiffs, committed the bale of handkerchiefs to one *Cannon*, their clerk and assistant, with direction to put them on board the packet belonging to the defendant, in order that they might be carried to *Norfolk*, and there delivered to the plaintiffs. That *Cannon* went on board the packet with the bale of handkerchiefs, and not finding the captain there, he delivered the same to a boy named *Peter Florey*, who was then in the employ of the defendant, and who was called cabin-boy of the vessel, but who was proved to have usually received small packages, or bundles of goods or merchandize, sent on board the vessel to be forwarded to *Norfolk*, when they were of a size sufficient to be stowed away in the cabin, and requested him to take particular care of the same, and that they belonged to the plaintiffs, to whom they were to be delivered on the arrival of the vessel at *Norfolk*. They also gave in evidence, that small packages of merchandize, which were intended to be sent to *Norfolk* in the vessel of the defendant, had been frequently committed to the care of *Peter Florey*, employed as aforesaid, in the presence and view of the defendant, and that he never countermanded such delivery, or in any way complained that the same was irregular. That the bale of handkerchiefs never was delivered to the plaintiffs. The defendant then gave in evidence, that the plaintiffs, finding that the handkerchiefs did not come to hand, afterwards retained certain moneys of *J. and R. K. Lowry*, then in their hands, arising from the sale of a quantity of butter, consigned to the plaintiffs by *J. and R. K. Lowry*, to the amount of the price and value of the handkerchiefs, and as and for satisfaction and payment thereof. He also gave in evidence, that the recovery in this cause was to be for the use of *J. and R. K. Lowry*, and that they had ordered the

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suit in this behalf to be instituted and conducted. He then prayed the court to direct the jury, that if the jury should, from the evidence, be of opinion that the plaintiffs applied the proceeds of the butter, consigned to them by *J. and R. K. Lowry*, to satisfy and pay themselves for the handkerchiefs which were not delivered, and that *J. and R. K. Lowry* have assented to that act, then that the plaintiffs upon the record are not entitled to recover in this form of action. This opinion and direction the court [*Nicholson, Ch. J. and Hollingsworth and Jones, A. J.*] accordingly gave. The plaintiffs excepted; and the verdict and judgment being against them they appealed to this court.

The cause was argued before *POLK, BUCHANAN, and EARLE, J.* by

*Winder*, for the Appellants; and by  
*Stephen*, for the Appellee.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

JUNE.

BRAYFIELD VS. BRAYFIELD.

A nuncupative will established where the personal property, of which the deceased died possessed, amounted by the inventory to \$3236 48.

A nuncupative will was proved by three witnesses, one of whom was the wife of one of the legatees, but which legatee had released all his interest, &c. to certain of the representatives of the deceased; and although the release was not accepted by the releasees, it was held to be a good release, and that the will was legally proved.

APPEAL from a decree of the Orphans Court of Frederick county. The nuncupative will of *Samuel Brayfield*, pronounced by him in the presence of three witnesses on the 22d of April 1807, two days before his death, he being then in his last sickness, at his own house, and afterwards on the 28th of April 1807, reduced to writing, and signed by the three witnesses in the presence of two witnesses, was offered for probate in the orphans court. One of the witnesses of the will was the wife of one of the legatees, but which legatee, by a release duly executed on the 28th of April 1807, released to *John Brayfield*, (the appellee,) and his sister *Milley*, a brother and sister of the whole blood of the deceased, all his right, claim and interest, under the will. The other property of the deceased, amounting by an inventory thereof, to \$3236 48, he bequeathed to his wife and her two children, *S and J. Pancoast*, then living with the deceased, and to whom he was guardian. Citations issued for the persons related to the deceased, none of whom but *Jane Brayfield*, (the appellant,) the widow of the deceased, were summoned. She

appeared, and not objecting, the probate of the will was ordered by the court to be taken and recorded; and probate was accordingly taken before the orphans court on the 9th of June 1807, of the three witnesses of the nuncupative will of *S. Brayfield*, so reduced to writing, and signed by them; and letters of administration, with a copy of the said will annexed, were granted to *Jane Brayfield*. On the petition of *John Brayfield*, the brother of the deceased, the court proceeded to rehear the case, and caused sundry depositions of witnesses to be taken. After which, they decreed that the will, purporting to be the nuncupative will of *Samuel Brayfield*, ought not to prevail, and that the letters of administration be revoked. From that decree *Jane Brayfield* appealed to this court.

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The cause was argued before POLK, BUCHANAN, EARLE, and JOHNSON, J.

*Shaff* and *Taney*, for the Appellant, contended, that the release by *Davis*, was a good release, although it was not accepted by the releasees. They cited *Shaffer vs. Corbett*, 3 *Harr. & M'Hen.* 513; and *Peake's Evid.* 159.

*Brooke*, for the Appellee, referred to the act of 1798, *ch.* 101, *sub ch.* 2, *s.* 13, and contended that the will must be proved by three disinterested witnesses. That the release by *Davis* was not accepted, and that it had not been given to all of the representatives of the deceased, and of course it had no operation.

THE COURT reversed the decree of the orphans court, and decreed that the nuncupative will of *Samuel Brayfield*, stated in the record, be confirmed, and that it be admitted to probate by the orphans court, and that the letters of administration, granted to *Jane Brayfield*, be also ratified and confirmed.

DECREE REVERSED.

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Karn  
vs  
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KARN'S LESSEE VS. HUGHES.

APPEAL from *Washington County Court*. This was an action of ejectment to recover a tract of land called *Walling's Mistake*. The defendant, (now appellee,) took defence on warrant, and plots were made.

A and B claimed the same land under different grants, bearing the same date, issued on certificate of survey, also bearing the same date, made under common warrants; that B granted by renewment on the 29th of October 1754, and that to A granted on the 3d of February 1755, but A's certificate was first examined and passed. In an action of ejectment brought by the lessee of A—Held, that he was not entitled to recover, although the grant to A actually issued before the grant to B.

1. The plaintiff at the trial produced in evidence a grant for the tract of land called *Walling's Mistake*, dated the 8th of March 1755, to *Alexander M'Cullom*, for  $25\frac{1}{2}$  acres of land, which grant recites a common warrant granted on the 5th of March 1755, to the said *M'Cullom*, for  $25\frac{1}{2}$  acres of land, and a certificate of survey made the 8th of March 1755. He also offered evidence, from the records of the land office, that the warrant issued on the 3d of February 1755, that the survey was made on the 8th of March 1755, and was examined and passed on the 10th of December 1755, and that the grant issued thereon on the 8th of March 1755. He also offered in evidence a deed from *M'Cullom* to the lessor of the plaintiff, for said land, dated the 22d of March 1802. He also proved, that in March 1754, *M'Cullom* lived on the land, and always claimed it. The defendant then offered in evidence a grant to *James Walling* for *Teague's Disappointment*, dated the 8th of March 1755, for 30 acres of land, reciting a warrant dated by renewment the 29th of October 1754, and a certificate thereunder returned the 8th of March 1755, and which was examined and passed on the 30th of June 1756. He also offered in evidence a deed from *Walling* to *John Mason* for the last mentioned land, dated the 29th of October 1765. He also proved, that 30 years ago one *Kearsly* lived upon the said land, and afterwards one *Stiffy*, both of whom claimed under the defendant; that afterwards one *Wolf* lived on it, and claimed under *M'Cullom*, who sold his right to one *Myers*, and after *Myers* left it, *M'Cullom* sold the same to the plaintiff's lessor by the deed before mentioned. He also proved, that on the 28th of April 1791, a warrant of forcible detainer was issued against *Myers*, and when the jury met the dispute was agreed, and *Myers* became the tenant of the defendant, and that *Wolf* was present at the time, and that the defendant has ever since remained in possession. The plaintiff then prayed the court to direct the jury, that if they were of opinion from the evidence, that the certificates of surveys for *Wal-*

*ling's Mistake* and *Teague's Disappointment*, bear date on the same day, but that the grant for *Walling's Mistake* actually issued before the grant for *Teague's Disappointment*, that then the plaintiff was entitled to recover. Which direction the court, [Cluett and Shriver A. J] refused to give, The plaintiff excepted.

2. The defendant then prayed the court to direct the jury, that under the evidence offered, the plaintiff was not entitled to recover. This direction the court gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before POLK, NICHOLSON, and EARLE, J. by

T. Buchanan, for the Appellant; and by  
Brooke, for the Appellee.

JUDGMENT AFFIRMED.

PETER VS. SCHLEY'S Lessee,

JUNE.

ERROR to *Frederick County Court*. Ejectment to recover a leasehold interest in a tract of land called *Lost and Found*. Defence was taken on warrant, and plots were made.

1. At the trial the plaintiff, (now appellee,) read in evidence a grant to *Joseph Beall* for the tract called *Lost and Found*, containing 85 acres, dated the 23d of April 1748, and also a grant to said *Beall* for a tract called *Choice Improved*, containing 649 acres, dated the 8th of November 1752, and also a lease from the p'tentee for part of said lands to *John Beall*, dated the 22d June 1765, and a lease from *John Beall* to *Jacob Harman*, dated the 1st day of April 1775. The last lease was as follows: "*Frederick county, in Maryland, to wit. This indenture, made the eleventh day of April in the year of our Lord seventeen hundred and seventy-five, between John Beall of the one part, and Jacob Harman, millwright, of the*

A lease by the grantee of a tract of land for a part thereof, on the 22d June 1765, to J B. for 71 years, at the annual rent of 5l, who on the 11th of April 1775, assigned the lease to J H for 60 years at the annual rent of 100l until the 24th March 1779, and 50l for one year commencing the 24th March 1780, and a pepper corn annually for the residue of the term, with a clause of re-entry, &c. and a covenant to pay the rents or vacate the premises, &c. and a covenant to pay the original lessee the rent of 5l during the term, J H, entered in 1775, and continued until 1780, and then left the premises. It was in possession on 25th of

February 1785, claiming under the lessor of the plaintiff, and 380l being unpaid to J B, he then entered &c. under the lease of the 11th of April 1775, and possession was given up to him by J R. On the 13th of April 1791, J B. leased to the defendant, who entered on the premises, improved the same, and paid taxes, &c. ever since. Held, that it was optional in J H to pay the stipulated rent according to the lease, or to vacate the premises. The interest which J H had in the lease could not be vacated, or transferred to J B, by the facts stated. His interest in the land being for a term exceeding seven years, could not be transferred by him otherwise than in the way prescribed by the act of 1766, ch 14, and no acts in pais were competent to that purpose. His liability to pay the rent would continue until same act was done by him legally operative to vacate the premises.

Where the facts stated were not, in the opinion of the court, a vacation of the premises, the power of the court is not to be transferred to the jury to make a legal deduction from the evidence, contrary to the opinion expressed by the court on those facts.

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other part, both residents of the county and province aforesaid, witnesseth, that the said *John Beall* and *Jacob Harman*, for and in consideration of the rent, services and covenants, herein after mentioned, contained, and to be performed on the part and behalf of the said *John Beall* and *Jacob Harman*, their executors, administrators and assigns, he the said *John Beall*, for himself, his heirs, executors and administrators, hath demised, leased and to farm let, and by these presents doth demise, lease and to farm let, unto the said *Jacob Harman*, his executors, administrators and assigns, all that tract or part of a tract of land situate, lying and being in the county and province aforesaid, upon great *Bennett's* creek, which was demised to him the said *John Beall* by a certain *Joseph Beall*, for a term that is yet unexpired, containing one hundred acres of land more or less, contained within the metes and bounds expressed in a deed of lease from *Joseph Beall* to the said *John Beall*, which said lease is enrolled amongst the land records of *Frederick* county, reference thereunto being had will more fully and at large appear, together with all and singular the dwelling-houses, out houses, pastured enclosures, easements, and appurtenances whatever, hereby leased, transferred and conveyed, by these presents, for and during the term of sixty years from August next, commencing from the 24th day of March last past; yielding and paying for the same, during the said term hereby demised, unto the said *John Beall*, his executors, administrators and assigns, yearly and every year, commencing from the aforesaid twenty-fourth day of March last past, the annual rent following, to wit, the sum of one hundred pounds common currency for every year until twenty-fourth day of March, which will be in the year of our Lord seventeen hundred and seventy-nine, and the sum of fifty pounds common currency for one year's rent commencing the twenty-fourth day of March seventeen hundred and eighty, and from thence and thenceforth, until the expiration and completion of the term hereby demised, the yearly rent of one pepper corn, if the same should be demanded; and if it shall happen that the rent before reserved in this indenture of lease, or any part thereof, should remain unpaid at any time seven days after the twenty-fourth day of March, which is the day the annual rent is hereby reserved, payable on the

same, being lawfully demanded, that then and from thenceforth it shall and may be lawful to and for the said *John Beall*, his executors, administrators and assigns, into the said demised premises to re-enter, and the same demised premises, and every part thereof, to have again, hold, possess and enjoy, as in his and their former and proper estate, right, title and interest, and the said *Jacob Harman*, his executors, administrators and assigns, thereout and therefrom to expel and put out; and the said *John Beall* hereby covenants for himself, his heirs, executors, administrators, that he has good right to lease the said land for the term hereby demised; and the said *Jacob Harman* also covenants for himself, his heirs, executors, administrators and assigns, that he will pay the rent reserved at the stipulated time, or vacate the premises. In witness whereof the parties have hereunto interchangeably their hands, and affixed their seals, the date above written. And farther more, the said *Jacob Harman* engages for himself, his heirs, executors and administrators, to pay unto *Joseph Beall*, his heirs, executors, administrators or assigns, the sum of five pounds currency yearly and every year, from the above date, during the term of the above lease, being the original annual rent.

Sealed and delivered in the  
presence of *Archd. Boyd*,  
*Thos. Rice*."

{ *Jacob Harman*, (seal.)  
*John Beall*, (seal.)

The lease was duly acknowledged and recorded, and was truly located as the claim and pretensions of the plaintiff. He also gave in evidence the admissions of the defendant's counsel, that the said granted and leased lands are truly located on the plots as located by the plaintiff. He further read in evidence letters of administration granted on the estate of said *Harman*, (then dead) to the lessor of the plaintiff, dated the 11th of March 1796. The defendant then offered evidence to prove that *Jacob Harman*, lessee of *John Beall*, entered on the leased land soon after his lease in 1775, and continued on the premises until 1780, and then left the premises, went to *Allegany*, returned to *Frederick* county, and lived off the premises, then went to *Virginia*, and died there, not having legally assigned his interest therein. "And that a certain *Ramsower* was in possession of the leased premises, by what title not known, on the 26th February 1785, but claiming

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the possession under the lessor of the plaintiff; and that £380 of the rent being unpaid to *John Beall*, he on the evening of that day entered on the premises, demanded payment of his rent in arrear, of *Ramsower*, no other person being in possession, and the same not being paid, he took possession of the premises as his own, under the lease of the 11th April 1775. That no demand of the rent, or any entry was made by the said *John Beall*, or by his authority, before the said 26th day of February 1785. That the said possession was given up to *Beall* by *Ramsower*. The plaintiff then offered evidence to prove, that *Jacob Harman* was in possession of the said lease, claiming under the said lease. That *Benjamin Nichols* went on the land aforesaid after *Harman* left it, claiming, as he said, possession under *Harman*, and that when *Nichols* left the land, *Adam Ramsower* went on it, and staid there until *John Beall* took it, and that after the said *Beall* left it, *John Peter*, deceased, took possession and retained it until his death. The defendant then read in evidence a lease executed by *John Beall* to a certain *John Peter*, for the same land, formerly leased to *Harman*, dated the 13th of April 1791; and further gave in evidence, that the said *John Peter*, in virtue of said lease, entered on and was possessed of the premises from the date of his lease to the time of bringing of this action, without claim, let or molestation, and built and made considerable improvements on the said demised premises; and further, that the assessment and taxes on the land in question were paid, for 1780, by *Benjamin Nichols*, for 1781, by the same person, and for 1782, 1783 and 1784, by the lessor of the plaintiff. But, from the entry made by *John Beall* on the 26th of February 1785, the said *John Beall*, and since his demise to *Peter*, the said *Peter*, hath paid all taxes and county charges arising due on said premises; and further, that *John Peter* the defendant, is son and devisee of *John Peter*, assignee of *John Beall*. The defendant then prayed the opinion of the court, and their direction to the jury, that if they find that *Harman*, the lessee of the premises, left the same in or before the year 1780, leaving the sum of £380 rent due and in arrear, and removed out of the state, not having legally assigned or transferred his interest, and died out of the state, and that *John Beall* afterwards, in 1785, entered on the premises, and demanded of a certain *Ramsower* living thereon, the

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rents due, and none was paid to him, and that he then took possession of the same, and afterwards leased them to *John Peter*, who entered thereon, and made valuable improvements thereon, and that no claim or demand of the premises was made by *Harman* until after his death, the same was demanded by his representative, the lessor of the plaintiff—that such acts of *Harman*, nonpayment of rent, removal out of the state, and non-assignment of the lease and entry of *Beall*, amount to an abandonment and vacation of the lease by *Harman*, and the plaintiff is not entitled to recover. Which opinion and direction the court, [*Buchanan*, Ch. J. and *Clagett* A. J.] refused to give. The defendant excepted.

2. The defendant further prayed the opinion of the court, and their direction to the jury, that if the jury find the facts stated on the part of the defendant to be true; that then they are evidence to them of an abandonment and vacation of the lease by *Harman*, according to the stipulation of his covenant. But the court refused to give the direction. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant brought the present writ of error.

The cause was argued before CHASE, Ch. J. and POLK, NICHOLSON, EARLE, and JOHNSON. J.

*Key*, for the Plaintiff in error, referred to *Co. Litt.* 231, b. 338. 20 *Vin. Ab.* tit. *Surrender*, 139, 137; and *Jackson vs. Demarest*, 2 *Caine's Rep.* 382.

*Shaaff*, *Taney* and *Warfield*, for the Defendant in error, referred to 3 *Com. Dig.* tit. *Condition*, (A. 6.) 86. *Co. Litt.* 204, 211, 337. b. 6 *Com. Dig.* tit. *Surrender*, (F.) 315. *Rob. on Frauds*, 247, 250, 253, 254, 260. *Mackubin vs. Whetcroft*, 4 *Harr. & M-Hen.* 135; and *Eldridge vs. Knott*, *Cowp.* 216.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that it was optional in *Harman* to pay the stipulated rent, according to the lease, or to vacate the premises.

The interest which *Harman* had in the lease could not be vacated or transferred to *John Beall* by the facts stated in the bill of exceptions, and offered to be proved by the

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defendant. His interest in the land being for a term exceeding seven years, could not be transferred by him otherwise than in the way prescribed by the act of 1766, *ch. 14*, and no acts *in pais* were competent to that purpose. His liability to pay the rent would continue until some act was done by him legally operative to vacate the premises.

As the facts stated were not, in the opinion of the court, a vacation of the premises, the court did right in not transferring their power to the jury to make a legal deduction from the evidence, contrary to the opinion expressed by the court on the same facts.

This court concur in opinion with the court below on both of the bills of exceptions.

JUDGMENT AFFIRMED.

JUNE.

NOLAND VS. RINGGOLD.

To enable the assignee to maintain a suit in his own name on a promissory note, against the maker, it is essential that the words "or order," or "bearer," or words equivalent, should be inserted in the note; and no notes are within the statute for the purpose of assignment, but such as are made payable to A B, or order, or bearer. The words *or order*, or *bearer*, are of no importance in a suit brought by the payee.

The act for the amendment of the law (1809, *ch. 153*.) does not take in this case, although there may be other counts in the declaration, besides that upon the note, which are good

APPEAL from *Washington County Court*. This was an action of *assumpsit*, brought by the endorsee (now appellant,) against the maker, (now appellee,) on the following promissory note:

"\$2500.

*Baltimore*, 10th July, 1801.

Sixty days after date I promise to pay to *Simon Wilmer*, No. 28 Cheapside, *Baltimore*, twenty-five hundred dollars, for value received.

*Saml. Ringgold.*"

Thus endorsed, "*S. Wilmer.*"

The declaration contained, besides a count upon the note, counts for money lent and advanced, for money had and received, and for money laid out and expended. The general issue was pleaded; and at the trial sundry bills of exceptions were taken on the part of the defendant, to the opinions of the court, and a verdict given in favour of the plaintiff. The defendant moved the court in arrest of judgment, and among other reasons assigned, one was because it did not appear that the note, set forth in the declaration, was a negotiable note, and that therefore the plaintiff was not entitled to support an action thereon in his own name. The county court arrested the judgment, and the plaintiff appealed to this court,

The cause was argued before CHASE, Ch. J. and POLK, NICHOLSON, EARLE, and JOHNSON, J.

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*W. Dorsey and Taney*, for the Appellant, contended, 1. That the note was a negotiable note under the statute of 3 and 4 *Ann*, ch. 9, and that *Wilmer* had a right to endorse it so as to enable the holder to bring the suit thereon in his own name. They referred to that statute, and to *Smith vs. Kendall*, 1 *Exp. Rep.* 231. *Burchell vs. Slocock*, 2 *Ld. Raym.* 1545 *Moore vs. Page*, *Ca. temp. Talb.* 288. *Kyd on Bills*, 63, 64. *Brown vs. Harraden*, 4 *T. R.* 148; and *Chitty on Bills*, 165. 2. That there being several counts in the declaration, besides that on the note, all defects are cured by the act of 1809, ch. 153, for the amendment of judicial proceedings.

*T. Buchanan*, for the Appellee, cited *Smith vs. Kendall*, 6 *T. R.* 123. *Evans's Ess.* 139, 126. *Downing vs. Backenstoos*, 3 *Caine's Rep.* 137. *Lex. Mer.* 41. *Dawkes vs. De Lorane*, 3 *Wils.* 211. *Hill vs. Lewis*, *Salk.* 132, 133. *Gerard vs. La Coste*, 1 *Dall. Rep.* 194. *Chitty on Bills*, 59, 60, 90, 91. *Josselyn vs. Ames*, 3 *Mass. Rep.* 275; and *Barriere vs. Nairac*, 2 *Dall. Rep.* 249.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that to enable the assignee to maintain a suit in his own name, on a promissory note against the maker of the note, it is essential that the words "or order," or "bearer," or words equivalent, should be inserted in the note.

Prior to the statute of 3 & 4 *Ann*, ch. 9, no suit could be maintained on a promissory note, as *such*, by the payee against the maker. In *assumpsit* to recover money due on a promissory note, the plaintiff must have set forth the consideration for which it was given; and the plaintiff, although he could give the note in evidence, could not entitle himself to a recovery without proving the consideration on which it was given. Lord *Holt* resisted frequent attempts, which were made, to declare on the note as *such*, and to make it evidence without proving the consideration, and his persevering in that opinion is supposed to be the cause of enacting the statute of 3 & 4 *Ann*, ch. 9.

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That statute contains two provisions—The first empowers the payee to sue on the note, and makes it sufficient evidence to support his action without proving the consideration. The words of the statute are, “the money mentioned in such note shall be construed to be *by virtue thereof* due and payable to the person to whom the same is made payable.” The second provision empowers the assignee to sue in his own name if the note is made payable to A B, or order, or bearer. The insertion of those words makes the note transferrable, by giving authority to the payee to assign it. A note of hand being a chose in action, is assignable only under the statute, and no notes are within the statute for the purpose of assignment, but such as are made payable to A B, or order, or bearer.

The words *or order, or bearer*, are of no import or signification as to a suit brought by the payee, because as to him, the only thing essential was the enabling him to sue on the note, and to make it evidence without further proof.

All the cases which have been cited are suits by the payee, or the administrator or executor of the payee, against the maker, in which the courts decided the notes were within the statute—because as to him it was of no consequence whether the note was assignable or not. The case of *Burchell vs. Slocock*, 2 *Id. Raym.* 1545, was a suit by the administrator of the payee against the maker, and the court decided the note was within the state, although not made payable to order, or bearer, and very rightly, for the reasons the court have suggested. The court know of no case in which it has been determined that an assignee can maintain a suit in his own name against the maker, on a note in which those words are not inserted.

The court are of opinion, that the act of assembly of November 1809, *ch.* 153, does not take in this case.

JUDGMENT AFFIRMED.

JUNE.

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 LODGE VS. BOONE.

L entered into an injunction bond, together with O, as the sureties of J, to stay proceedings on a judgment recovered against J by B, which bond was signed and sealed by L, but his name was afterwards erased, and the name of H substituted in its place. On the dissolution of the injunction, a warrant from a justice of the peace was obtained on the bond by B against L, and the justice expressing his opinion that L was bound to pay B's claim on the bond, L paid the money, and afterwards brought an action of *assumpsit* for money had and received, against B, to recover it back—*Held*, that if L did sign and seal the bond, but that his name was erased therefrom before the delivery thereof to the clerk of the court, and before the injunction was granted by the court, and that the bond was approved, and the injunction was granted as the bond of J, H and O, then B had no right to recover the before mentioned money of L, and that L was entitled to recover the money back.

APPEAL from *Montgomery County Court*, from a judgment of nonsuit in an action of *assumpsit* for money had

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and received. *Non assumpsit* and limitations were pleaded. At the trial the plaintiff, (now appellant,) offered in evidence, that the defendant, about eight or ten years ago, obtained a warrant against him the plaintiff; that they both appeared before a justice of the peace for *Montgomery* county, to whom the warrant was returned, and before whom a trial was then had between the plaintiff and defendant, upon which trial the defendant claimed of the plaintiff £18. This claim was made against the plaintiff, as security of a certain *John Ball*, in four bonds—The first in the name of, and executed by, *John Ball*, *Henry O'Neale*, (the plaintiff's name first inserted and afterwards stricken out, and *Henry O'Neale's* name inserted,) and *John O'Neale*, to *Isaiah Boone*, (the defendant,) dated the 12th of June 1797, reciting a judgment obtained by *Boone* against *Ball*, in *Montgomery* county court, in an action of debt, to be released on payment of £22 10 0, with interest from 1st Nov. 1792, and from which judgment *Ball* had prayed an appeal to the said court as a court of equity. The bond was conditioned to pay such sum as the said court should adjudge, &c. The witnesses to the bond were *William O'Neale jun.* *William Ray jun.* *Basil Beckwith*, and *Samuel Dyson*. The other bonds were executed as the first, and for the same purpose, upon other judgments in other actions of debt, for sums of the same amount, with interest from different periods. They were executed and witnessed by the same persons as the first bond. That upon the said trial, the magistrate declared that he considered the plaintiff liable to pay the defendant the amount of his claim on the bonds aforesaid, and upon the magistrate's expressing this opinion, the plaintiff paid the amount of the claim to the defendant. The plaintiff also offered in evidence, that in March 1806, in a conversation between himself and the defendant, he told the defendant that he ought not to have paid him the money, as he had found that he was not in the bonds, (alluding to the bonds above mentioned,) and that the defendant said, that if that was the case he must repay him the money. He also offered in evidence, that the name *William Lodge*, signed to the said bonds, was erased and obliterated. It was admitted that the name signed *William Lodge*, was in the proper handwriting of the plaintiff, and that the bonds had continued in the custody of the clerk ever since

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the injunction was granted. The defendant then offered in evidence the four bonds referred to by the plaintiff, and proved by *William O'Neale*, junior, the subscribing witness to them, that he signed the same as a witness. He further gave in evidence the declaration of the plaintiff, made at different times, that he had signed the bonds as one of the obligors, and was liable to pay the defendant his proportion thereof; and further, that on the trial before the magistrate, in which the bonds were the foundation of the warrant, by the defendant against the plaintiff, long after the bonds were filed in court, and after the injunction was dissolved, the plaintiff did then acknowledge he was liable to pay to the defendant one half of the money arising on the costs secured by such bonds. He further offered evidence to prove, that the plaintiff was a connexion, by marriage, of *Ball's* wife, and acted as their agent in the suits between *Boone*, the defendant, and *Ball*. It was admitted that *Henry O'Neale* and *John O'Neale*, whose names appear to be signed to the bonds, were the brothers of *Ball's* wife, and the name *John O'Neale*, subscribed as an obligor to each of the four bonds, was in the handwriting of the said *William O'Neale*, the subscribing witness. The said *William O'Neale*, junior, also proved, that he did not recollect any thing about the execution of the bonds, and that he did not remember ever to have seen them until a year or eighteen months before he was sworn on this trial. The plaintiff then prayed the opinion of the court to the jury, that if the jury should find from the evidence that he the plaintiff did sign and seal the bonds aforesaid, but that his name was erased therefrom before the delivery thereof to the clerk of *Montgomery* county, and before the injunction was granted by the court, and that the bonds were approved, and the injunction granted by the court, as the bonds of *Ball* and the two *O'Neale's*, whose names were signed thereto, then the defendant had no right to recover of him the plaintiff the £18 aforesaid. But the Court, [*Chase*, Ch. J. and *Harwood*, A. J.] refused to give this direction, being of opinion, and so directing the jury, that if they find, on the whole of the evidence produced, that the plaintiff did sign, seal and deliver, the bonds, before the razures appearing on the bonds were made, and that the razures were not made by the obligee, or with his privity or consent, and that the bonds were not

in the custody and keeping of the obligee subsequent to the delivery thereof, that then the plaintiff cannot recover in this action. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

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West  
vs  
Hall

The cause was argued before POLK, BUCHANAN, and NICHOLSON, J. by

Taney, for the Appellant(a); and by  
F. S. Key, for the Appellee.

JUDGMENT REVERSED, AND PROCEEDENDO AWARDED.

(a) He referred to *O'Neale vs. Long*, 4 Cranch, 60; and *The State vs. Sim vs. Oden*, 2 Harr. & Johns. 108, (note.)

## WEST'S EX'X. VS. HALL.

JUNE.

APPEAL from a decree of the Court of Chancery. The cause, which is fully stated in the opinion delivered by this court, was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, and EARLE, J.

Martin and Shaaff, for the Appellant, contended, 1. That the bill ought not to have been taken *pro confesso*. 2. That the bill though taken *pro confesso*, affords of itself no ground for relief. On the first point, they referred to *Hawkins vs. Crook*, 2 P. Wms. 556, S. C. 2 Eq. Ca. Ab. 179; and *Davis vs. Davis*, 2 Atk. 21. On the second point, they cited 2 Bac. Ab. 405, 406. *House & Downs vs. Lord Petre*, 1 Salk. 311. *Morgan vs. Stale, et ux.* 2 Harr. & Johns. 38. *Mif. 40*, (note;) and *Uxbridge vs. Staveland*, 1 Ves. 56.

W H by his will bequeathed a legacy to W H H, the complainant, and appointed S W and S W J his executors. S W acted as such executor, and possessed himself of the personal estate. W H also by his will devised to S W J sundry tracts of land, which he made chargeable with W H H's legacy in case the personal estate should be deficient. S W never passed any account of the personal estate. W H H brought suit at law for his legacy, but not being able to prove assets, &c., his suit was dismissed. S W is dead, and by his will appointed H W his executor, who acted as such, and possessed herself of the personal estate of S W more than sufficient to pay W H H's legacy. Bill in chancery by W H H, against H W executrix of S W, and S W J, charging the above facts, and that W H left a large real and personal estate more than sufficient to pay all his debts and legacies. The bill was taken *pro confesso* against H W, and she appealed to the court of appeals. Held, that if the facts stated in the bill are not sufficient to entitle the complainant to the relief prayed, he cannot resort to the answer of the defendant, the proof taken in the case, or any extraneous matter, to supply the defects in the charges contained in the bill. The bill did charge that the personal estate of W H was sufficient to pay the debts and legacies. It charged that the real and personal estate of the deceased to a considerable amount, but it did not state that personal estate of W H came to the hands of the executor sufficient to pay the debts and legacies. It did not state that S W, the executor, wasted or misapplied the personal assets, so as to create a liability on his executrix to the amount so wasted, and to make his personal estate the fund out of which it was to be paid. It did not state that any part of the personal estate of W H came to the hands of H W executrix of S W. Every bill in chancery must state sufficient facts to entitle the complainant to the relief prayed, or relief under the general prayer. There were not facts charged in the bill sufficient to make H W executrix of S W, liable to pay the complainant's legacy. The bill, to make her liable, ought to have charged the facts herein before stated. The bill being substantially defective, the chancellor, on application, would have granted leave to amend, and the defendant must have answered the amended bill. H W, as executrix of S W, was not the legal representative of W H.

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*T. Buchanan and Magruder*, for the Appellee, referred to *Dep. Com. Guide*, 69, and 1 *Fonbl*, 319.

CHASE, Ch. J. delivered the opinion of the court. The bill in this case, which was filed by the complainant, (now appellee,) against the executrix of *Stephen West*, and *Stephen West* his son, states, that *William Hall* died in September 1770, having first made his will in writing, wherein he bequeathed £300 sterling to the complainant, *William Hall*; that he appointed *Stephen West*, executor, who acted as such, and possessed himself of the personal estate of the deceased to a very large amount. That *William Hall*, the testator, devised to the defendant, *Stephen West*, sundry lands and tenements, and other real estate, which he made chargeable with the complainant's legacy in case the personal estate should be deficient. The complainant refers to the said will, and makes it part of his bill of complaint. That *Stephen West*, the executor, never passed any accounts of the personal estate of *William Hall*, so that the amount of the personal estate could not be ascertained, or whether the same was sufficient to discharge the legacies. That the complainant brought a suit in the general court, which was dismissed at May term 1796, the complainant not being able to prove personal assets came to the executor's hands sufficient to pay the legacy. That *Stephen West*, the executor, died in 1796, without having settled any account with the orphans court respecting his said administration, having made his will, and appointed *Hannah West*, (one of the defendants,) his sole executrix, who acted as such, and who possessed herself of the personal estate of *Stephen West*, deceased, more than sufficient to pay the complainant's legacy. That the complainant applied to *Stephen West*, *Hannah West*, and the defendant *Stephen West*, for the payment of the legacy, and they all pretended that *William Hall* died insolvent. The complainant charges, that *William Hall* left a large real and personal estate, more than sufficient to pay all his debts and legacies.

It appears by the will of *William Hall*, referred to and made part of the bill, that *Stephen West*, the defendant, was made an executor with his father, *Stephen West*.

*First question*—Whether on the death of *Stephen West*, the father, the executorship of the estate of *William Hall* did not devolve on *Stephen West*, the defendant? And if so, *secondly*, whether the present bill can be supported against *Hannah West*, executrix of *Stephen West*? And if it can, *thirdly*, whether the bill ought not to charge positively and directly that personal assets belonging to the estate of *William Hall* came to her hands sufficient to pay the debts and legacies of *William Hall*?

The bill is taken *pro confesso*; and if the facts stated in the bill are not sufficient to entitle the complainant to the relief prayed, he cannot resort to the answer of the defendant, the proof taken in the case, or any extraneous matter, to supply the defects in the charges contained in the bill.

The personal estate of *William Hall*, after payment of debts, was to be applied to the payment of the legacies, and if deficient, the real estate devised to *Stephen West*, the defendant, was chargeable with the payment of them.

The bill does not charge that the personal estate of *William Hall* was sufficient to pay the debts and legacies. It charges that the *real* and *personal* estate were sufficient. It charges that *Stephen West*, the executor of *William Hall*, possessed himself of the personal estate of the deceased to a *considerable* amount, but it does not state that personal estate of *William Hall* came to the hands of the executor sufficient to pay the debts and legacies. It does not state that *Stephen West*, the executor, wasted or misapplied the personal assets so as to create a liability on his executrix to the amount so wasted, and to make his personal estate the fund out of which it was to be paid. It does not state that any part of the personal estate of *William Hall* came to the hands of *Hannah West*, executrix of *Stephen*, one of the defendants.

Every bill in chancery must state sufficient facts to entitle the complainant to the relief prayed, or relief under the general prayer. There are not facts charged in the bill sufficient to make *Hannah West*, executrix of *Stephen West*, liable to pay the complainant's legacy. The bill, to make her liable, ought to have charged the facts herein before stated to be necessary. The bill being substantially defective, the chancellor, on the application of the complainant's solicitor, would have granted leave to amend,

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and the defendants must have answered the amended bill.

The court are of opinion, that *Hannah West*, as executrix of *Stephen West*, is not the legal representative of *William Hall*, and that there are not sufficient facts stated in the bill to charge *Hannah West*, as executrix of *Stephen West*, with the payment of the said legacy.

DECREE REVERSED.

JUNE.

THE STATE, USE OF ECKMAN, VS WOLFE, *et al.*

Upon the drawing of a lottery a certain ticket therein owned by J. E., for whose use this action was brought, drew a prize, but upon the conclusion of the drawing there were found in one of the wheels 14 blanks, and prizes, against which there were no corresponding numbers remaining in the other wheel, and the managers drew the lottery over again; on the second drawing, before the wheels were exhausted, several mistakes were detected, and the managers discontinued the second drawing, and commenced a third drawing, on which the blanks and prizes and numbers came out even. In neither the second nor the third drawing was the prize claimed by the plaintiff drawn—Held that the action could not be maintained.

APPEAL from *Frederick County Court*. This was an action of debt brought at the instance and for the use of *Jacob Eckman*, on a bond executed by the defendants as managers of a lottery, &c. The defendants, (now appellees,) pleaded general performance, to which there was a replication of non-performance, assigning the breaches, &c.

At the trial, the plaintiff offered in evidence an office copy, under seal, of the bond of the defendants, as managers of the lottery therein mentioned, dated the 4th of April 1804, and which was taken agreeably to the act of 1803, ch. 55. The plaintiff also offered in evidence the scheme of a lottery, which is admitted to be the scheme proposed by the managers. Also a lottery ticket, No. 5626, and which was admitted to be one of the tickets issued by the managers. The plaintiff then proved, by the testimony of *Charles Baltzell*, that the drawing of the lottery was commenced, and that he was present when part of the numbers, blanks and prizes, were put in the wheels by the managers, but does not recollect whether he saw the whole of them put in or not; that at that time he, the witness, heard of no error in counting or putting into the wheels the blanks and prizes. The plaintiff further proved, that the managers proceeded to draw the lottery, and that after some days drawing, the number of the ticket abovementioned was drawn against the prize of \$300 mentioned in the scheme. The plaintiff further proved, that *Jacob Eckman*, for whose use this action was brought, presented the above ticket to *Jacob Wolfe*, one of the defendants, and demanded payment of the prize, and that *Wolfe* refused to pay it, and that this demand was made more than two months, and within six months, after the

drawing of the lottery was completed. The defendants then proved by a competent witness, that at the conclusion of the drawing of the lottery, there was found in one of the wheels fourteen blanks and prizes against which there were no corresponding numbers remaining in the other wheel; that the managers then concluded to draw the lottery over again. That on the second drawing, before the wheels were exhausted, several mistakes were detected in the second drawing by them, there being duplicates of the numbers drawn from one of the wheels. That the managers discontinued the second drawing, and commenced a third drawing; on which third drawing the blanks and prizes and numbers came out even, and that neither on the second nor third drawing was the prize claimed by the plaintiff drawn by him. The plaintiff then prayed the opinion of the court to the jury, that if they shall find from the evidence that the numbers, and blanks and prizes, were all put in the wheels before the drawing commenced, and that the drawing of the lottery was regularly begun according to law, and that the said ticket No. 5626 drew the prize of \$800, that then the plaintiff is entitled to recover. Which opinion the court, [Buchanan, Ch. J. and Clagett and Shriver A. J.] refused to give. The plaintiff excepted; and the verdict and judgment being for the defendants, the plaintiff appealed to this court.

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vs  
Gun.

The cause was argued before POLK, EARLE, and JOHN-  
SON, J. by

Taney and Brooke, for the Appellant; and by  
Warfield, for the Appellee.

JUDGMENT AFFIRMED.

BURGESS VS. GUN.

JUNE.

APPEAL from Baltimore County Court. This was an action of replevin for 110 hhds. of tobacco, marked C. The defendant, (now appellant,) pleaded property. The facts were admitted at the trial to be these—*Alexander*

from B to A, but which charter party was never executed. That H G put on board the vessel the tobacco, and afterwards sold the same to the plaintiff, and gave an order for it on the defendant, who refused to deliver it, but insisted that the cargo should be completed, and the vessel should proceed to perform the voyage, and that the freight should be paid, both of which H G, and the plaintiff, refused to do. Held, that the defendant had no lien on the tobacco, for freight, no freight being in fact due before the commencement of the voyage; and that if an injury had been sustained by the owner of the vessel, in consequence of a violation of the contract on the part of H G, the proper remedy was to be sought by an action against him.

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*Mactier*, on the 17th of May 1800, at the city of *Baltimore*, entered into an agreement with *Howes Goldsborough*, that a charter party should be drawn between them for the *Snow Maryland*, Capt. *Thos. Burgess*, from *Baltimore* to *Amsterdam*, for and in consideration of 6,500 Spanish milled dollars, payable on her delivering the cargo at the said port. In pursuance of this agreement, *Goldsborough* afterwards put on board the *Snow*, at the city of *Baltimore*, the tobacco mentioned in the declaration, and after lading the tobacco, to wit, on the 30th of May 1800, sold the same to the plaintiff, and gave an order on the defendant, who was the master of the *Snow*, to deliver the tobacco to the plaintiff. This order the defendant refused to comply with, and the plaintiff sued forth the present writ of replevin. In pursuance of said agreement a charter party was drawn up and approved by both parties, who agreed to sign it. *Goldsborough* afterwards, and after the lading the tobacco on board the *Snow*, in pursuance of said agreement sent for the charter party so drawn up, and had it in his custody with a view to sign it, but instead of signing it, he afterwards wholly refused to sign it, in consequence of his having failed, and transferred as before stated, the tobacco to the plaintiff, and destroyed the charter party; and that the charter party was never executed. Before and after the sale of the tobacco to the plaintiff, *Alexander Mactier*, and the defendant, and the *Snow*, were at all times ready to take on board any cargo which *Goldsborough* might chuse to put on board; but that after having put on board the tobacco, and certain other goods, he wholly refused and neglected to put on board any further cargo. The *Snow* was in all respects prepared to sail her said voyage, as related to the part to be performed by *Mactier*, except the shipping of her hands, and her clearance, both which *Mactier* was ready and willing to have done as soon as *Goldsborough* should complete the lading of the cargo; and that it was always the practice in the port of *Baltimore* to ship hands, and clear out the vessel, after the cargo is put on board. The goods, which had been put on board, were not a full lading for the *Snow*, and were not the whole of the cargo intended to be put on board by *Goldsborough*, and that he did not order, nor wish the *Snow* to sail on the said voyage with the cargo then on board; and that he assigned the tobacco

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to the plaintiff, in payment of a debt contracted for the purchase of the same tobacco from the plaintiff, and abandoned altogether any further connexion or concern in said intended voyage, or the property laden on board the *Snow*, and refused to complete the lading of the *Snow*, which was to have been performed by him previous to her sailing; and that the *Snow* was prevented from sailing on said voyage, for the purpose of delivering the cargo at *Amsterdam*, solely by the acts of *Goldsborough* and the plaintiff; and that the defendant, as master of the *Snow*, and the agent of *Mactier*, did refuse to deliver the tobacco in pursuance of the herein before recited order of *Goldsborough*; but insisted, that the cargo should be completed, and the vessel should proceed to perform the voyage according to said agreement, and that the freight should be paid; both of which *Goldsborough* and the plaintiff absolutely refused on their part. The *Snow* never sailed on the said voyage. After the tobacco was taken under the present writ, out of the *Snow*, and *Goldsborough* and the plaintiff had so refused to permit her to proceed on her voyage, *Mactier* did, on the 19th of June 1800, sell the *Snow* to *Robert Gilmor & Sons*. *Mactier*, before the agreement herein before stated between him and *Goldsborough*, expended a considerable sum of money in preparing the *Snow* for a voyage on the high seas. Upon these facts, the plaintiff prayed the opinion of the court, and their direction to the jury, that he was entitled to recover. This direction the court, [*Nicholson Ch. J.*] gave, being of opinion that the defendant had no lien on the goods for freight, no freight being in fact due before the commencement of the voyage; and that if injury had been sustained by the owner of the *Snow*, in consequence of a violation of the contract on the part of *Goldsborough*, the proper remedy was to be sought by an action against him. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *POLK, BUCHANAN, EARLE,* and *JOHNSON, J.*

*Harper and Winder*, for the Appellant, cited 1 *Esp. Dig.* 146. *How vs. Beech*, 3 *Lev.* 244. *Winter vs. Fowler*, 2 *Roll. Rep.* 59. *Co. Litt.* 209, a. *Hurford vs.*

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Seney

*Peter, Cro. Jac. 483. Touteng vs. Hubbard, 3 Bos. & Pull. 295, 296, (note;) and 1 Com. on Cont. 554, p. Lawrence, J.*

*Martin and W. Dorsey, for the Appellee, cited Smith vs. Wilson, 8 East, 437. Molloy, 570; and Curling vs. Long, 1 Bos. & Pull. 634.*

JUDGMENT AFFIRMED.

DEC. (E S.)

ROSEBERRY & STEVENS VS SENEY, *et al.* Lessee.

If the term of a demise in the declaration in an action of ejectment, expired before the verdict and judgment in the court below, the judgment is erroneous, and on appeal will be reversed.

In such a case the court below, under a *procedendo* directing a new trial, may enlarge the term of the demise.

Where the plaintiff in ejectment gave in evidence a certificate of survey of the land for which the action was brought called *Notlar's Desire*, made for N C in 1685, without showing a patent for the land; also a deed from R C to M F, dated in 1729, for part of a tract of land called *Notley's Desire*.—*Held*, that the deed could not be read in evidence.

If a deed from H to N for part of a tract of land, has been located on the plots, then a deed from H and N to J, for the same part of the said tract of land, need not also be located.

APPEAL from *Queen-Anne's County Court*. Ejectment for a tract of land called *Notlar's Desire*, containing 198 acres, on a joint demise by the lessors of the plaintiff, (now appellee,) for six years from the 1st of March 1801. Defence was taken on warrant, and plots were made.

1. At the trial in October 1809, the plaintiff, in deducing his title to the land for which the action was brought, offered in evidence the certificate of the tract of land called *Notlar's Desire*, containing 198 acres, made for *Nicholas Clouds*, on the 4th of July 1685, without showing a patent for the tract called *Notlar's Desire*. He then offered in evidence an instrument of writing, purporting to be a deed of bargain and sale from *Richard Clouds* to *Michael Fling*, dated the 5th of August 1729, for 38 acres, described by metes and bounds, being part of a tract called *Notley's Desire*. The defendants, (the appellants,) objected to the reading of this paper to the jury, and prayed the court to reject the same. But the Court, [*Purnell and Worrell. A. J.*] was of opinion that it was proper and legal evidence, and admitted it to be read. The defendants excepted.

2. The plaintiff then gave in evidence sundry mesne conveyances from *Nicholas Clouds*, for whom the survey of *Notlar's Desire* was made, to *Joshua Seney*, the father of the lessors of the plaintiff, and from whom it was admitted that they claimed by descent. The plaintiff had located on the plots in the cause the deed from *Richard Clouds* to *Michael Fling*. He had also located a deed from *Thomas Hamer* to *David Nevill*, dated the 17th July 1783, for three and a half acres, described by courses and distances, part of a tract called *Notley's Desire*; but had not located

the deed, under which the plaintiff claims title, from *Thomas Hamer* and *David Nevill* to *Joshua Seney*, dated the 26th of February 1785, for the same part of the tract called *Notley's Desire*, as mentioned in the deed from *Hamer* to *Nevill*. The defendants took defence for certain lands designated on the plots, and claimed the same as part of a tract called *Brotherhood*; and they prayed the court to direct the jury, that the plaintiff was not entitled to recover any part of the premises, unless the deed, under which he claimed, from *Hamer* and *Nevill* to *Joshua Seney*, was located on the plots. But the court refused to give this instruction to the jury, being of opinion there were sufficient locations on the plots to entitle the plaintiff to recover. The defendants excepted; and the verdict and judgment being against them, they appealed to this court.

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The cause was argued before POLK, NICHOLSON, and JOHNSON, J.

*Hammond*, for the Appellants, contended, that as the term of the demise laid in the declaration had expired before the trial in the court below, no judgment ought to have been entered for the plaintiff below. If the term expires pending the suit, the plaintiff cannot recover the possession. *Runn. Eject.* 121, 122.

On the first bill of exceptions, he contended, 1. That the certificate of survey gave no title without a patent for the land; that a patent cannot be presumed, unless possession of the land has gone with and under the certificate of survey; and that an action of ejectment cannot be supported upon a certificate of survey, where no patent had been granted. He cited *Seward's Lessee vs. Hicks*, 1 Harr. & M-Hen. 22; and *Sollars's Lessee vs. Bowen*. *Ibid* 198.

2. That if an action of ejectment can be maintained on the certificate of survey without a patent, yet the deed from *Clouds* to *Fling*, for part of a tract of land called *Notley's Desire*, cannot be evidence of a title under a certificate of survey for a tract called *Notlar's Desire*.

*Carmichael*, for the Appellee. 1. The demise laid in the declaration is mere matter of form and not substance. As the courts do not require proof of the lease stated in the declaration, so this court will not require proof of its

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continuance. *Runn. Eject.* 106. As the plaintiff might before verdict have amended and enlarged the term of the demise, so the verdict will cure the defect of the fictitious lease having expired. The act of 1809, *ch.* 153, cures the defect, if there be any.

2. The objection in the *first* bill of exceptions to the deed from *Clouds* to *Fling*, was not to its sufficiency, but to its being read. The deed might not have been sufficient evidence of itself; but if with other evidence, which the plaintiff might have produced, it could have been made sufficient, it ought to have been read to let in such other evidence. If the patent had been lost, how was the loss to be supplied, except by permitting the various conveyances to be read, and proof of possession accompanying them? And yet how can that be made to appear, except by taking the different conveyances in succession? *Notley's Desire*, and *Notlar's Desire*, were the same. But if it was doubtful whether the land was the same, yet the deed ought to have been read to enable the plaintiff to prove it was the same. The deed and the certificate of survey do not correspond in the description, because the deed is only for part of the tract of land included in the certificate.

3. The *second* bill of exceptions, in addition to the evidence offered in the *first*, states that sundry mesne conveyances were produced, deducing the title down to the ancestor of the lessors of the plaintiff. These deeds were all located on the plots, except that from *Hamer* and *Nevill* to *Seney*, which was for the same part of the tract as that conveyed from *Hamer* to *Nevill*, and as the last mentioned deed was located on the plots, the court below very properly permitted the deed from *Hamer* and *Nevill* to *Seney* to be read, as there was a sufficient location on the plots of the part conveyed by that deed.

*Hammond*, in reply. 1. If the lease stated in the declaration is matter of form, still it is a form which must be pursued. The circumstance of the plaintiff's being forced to enlarge the term of the demise, if it has expired, shows that the form must be adhered to. If the defendant refuses to confess the lease, entry and ouster, the plaintiff is forced to take his judgment against the casual ejector. The act of 1809, *ch.* 153, does not embrace this case; for as the court below could not amend after verdict, neither can

this court. 2. This court must decide on the facts stated in the bill of exceptions. If the tract of land had acquired by reputation a different name from that given in the certificate of survey, the plaintiff should have described it as *Notlar's Desire*, otherwise called *Notley's Desire*; and not having done so, he must be confined to the name mentioned in his declaration. Although the deed from *Clouds* to *Fling*, with other evidences of title, might be proper to be read, yet without them the deed could not be proper evidence. There is nothing to show why the court dispensed with a patent for the land, except the certificate of survey, and the deed. The court are not bound to permit to be read in evidence any deed or paper the counsel may require to be read; but the counsel must show the relevancy of the deed or paper to the case before the court.

THE COURT were of opinion, that there was error in the judgment, because the term of the demise stated in the declaration had expired before the trial in the court below. They *dissented* from the opinion of the court below in the *first* bill of exceptions, but *concurred* in the opinion in the *second* bill of exceptions; and they awarded a *procedendo*, being of opinion, that when the record went back for a new trial, the court below could enlarge the term of the demise.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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WILLIAMS VS. GALE.

DEC. (E. S.)

APPEAL from *Somerset County Court*. This was an action on the case, brought by the appellee, (the plaintiff below,) against the appellant, (the defendant below,) for making and erecting a dam and bank of earth in and across an ancient stream of water which ran through the lands of the plaintiff and defendant, so as to overflow, drown, and cover with water, the land of the plaintiff, &c. The defendant pleaded not guilty, and issue was joined.

The defendant at the trial moved the court to direct the jury, that although it should appear to the jury, from the evidence, that there was a natural water course running and leading through the plaintiff's land, and through the defendant's land below the land of the plaintiff, yet if it should ap-

Where a natural water course run through the lands of A and B, and A had, by cutting ditches on his own land, contiguous to the water course, increased the quantity of water which run down the course, to the injury of B's land, by overflowing the part adjoining the water course—*Held*, that B had no right to erect a bank on his own land, across the water course, to stop or obstruct the course, in order to prevent such injury, and thereby overflow & damage the land of A.

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pear to the jury, from the evidence, that the plaintiff, by cutting ditches on his own land, contiguous to the water course, and making banks, and clearing and cultivating the land, in the occupation and use of his land increased the quantity of water which flowed or run down the water course, in a greater degree or quantity than what would have naturally run or flowed down the same water course, to the injury of the defendant's land, by overflowing the defendant's land adjoining the natural course; and that the plaintiff by the said means increased the velocity of the current of the water which came down the water course, to the injury of the defendant's land, that then and in that case the defendant had a right to erect any necessary bank on and within the limits of his own land, and across the water course, to obstruct the water course, and to prevent such injury, and for the enjoyment of the use and benefit of his own land, although the plaintiff's land should be damaged thereby; and that under such circumstances the plaintiff cannot support the present action, but that the jury should find a verdict for the defendant. This opinion and direction the court, [Polk, Ch. J. and Done, and Robins, A. J.] refused to give to the jury, but were of opinion, and so directed the jury, that under the above circumstances the defendant had no right to erect the bank to stop or obstruct the said water course. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before NICHOLSON, EARLE, and JOHNSON, J.

*Whittington*, for the Appellant, contended, that if the water *was increased* on the defendant's land, by the ditching of the plaintiff on his own land, the defendant had a right to dam it out; or if the *velocity* of the water was increased, he had the same right; for the conduct of the plaintiff caused a private nuisance, which the defendant could sue for or abate. He referred to 3 *Blk. Com.* 5, 218, 220. 1 *Morg. Vad. Mec.* 178, 180. 2 *Morg. V. M.* 168. *Wigford vs. Gill*. *Croke Eliz.* 269. 1 *Bac. Ab.* 54; and *Richards vs. Gunby*, (in the late General Court).

*J. Bayly*, for the Appellee, referred to the act of 1790, *ch. S.*

JUDGMENT AFFIRMED.

## TENANT VS. HAMBLETON.

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DEC. (E. S.)Tenant  
vs.  
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APPEAL from Talbot County Court. This was an action of trespass *quare clausum fregit*. The land, upon which the trespass was alleged to have been committed, was called *Knave Deceived*. The plaintiff, (now appellant,) at the trial gave in evidence the certificate and patent of *Knave Deceived*, surveyed on the 10th of March 1796 for, and granted to the plaintiff, on the 7th of April 1797, "lying on the south side of *Saint Michael's* river, and beginning at a small white oak, marked with six notches, standing in the woods at the end of the 17th or N W course of 75 perches of a tract of land called *Fiddeman's Discovery*, which oak bears N 77 degrees 15 minutes E, distant 45 perches from the division post between *Daniel Fiddeman* and *John Rolle*, and running with *Fiddeman's Discovery* N E 167 perches, to a tract of land called *Elliott's Folly*, then with said *Elliott's Folly* reversed S 25 degrees W 167½ perches, to the 16th course of *Fiddeman's Discovery*, then therewith S W 23 perches to the end of said line, then with the 17th course aforesaid to the first mentioned tree, containing and laid out for 57 acres." The plaintiff also gave in evidence the several certificates and patents of the tracts of land called *Cambridge*, (surveyed the 6th of October 1662, for *William Hambleton*;) *Martingham Enlarged*, (surveyed the 3d of May 1790 for, and granted the 5th of June 1793 to, *William Hambleton*;) *The Meadows*, (surveyed the 25th of May 1778 for *Matthew Tilghman*,) and *Elliott's Folly*, (surveyed the 26th of November 1685, for *Edward Elliott*,) in support or illustration of the several locations made on the plots returned in the cause. The defendant then gave in evidence the certificate and patent of the tract of land called *Neglect*, also located on the plots, surveyed the 20th of July 1795 for, and patented to *William Hambleton*, on the 29th of May 1797, "lying on the S. side of *Saint Michael's* river, beginning at the end of 200 perches on the S E line of *Martingham Enlarged*, being the 2d line of said land, and runs from thence S E 17 perches, till it intersects the N E line of a tract of land called *Elliott's Folly*, then with said line N E 48½ perches till it intersects the first line of a tract of land called *The Meadows*, then with said line S 86 degrees

To prove the location and survey of a tract of land calling to begin at the end of one of the lines of another tract, and to run to and intersect other tracts, &c. and that it began at said run to particular places described on the plots, parol evidence of the surveyor, who originally located and surveyed the tract of land, was admitted as legal and competent.

If certain tracts of land called for by a junior survey were surveyed by course and distance when the junior survey was made, then the grant on such junior survey passed no other land than was included by such survey.

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30 minutes W 32 perches, then N N E with the same land 58 perches, to the land called *Martingham Enlarged*, then with said land N 78 degrees 50 minutes W  $5\frac{1}{2}$  perches, then with a straight line to the first beginning, containing seven acres." The defendant also gave in evidence, in support of the location thereof made by him on the plots, the certificate and patent of the tract of land called *Fiddeman's Discovery*, surveyed on the 4th of December 1739 for, and granted on the 5th of August 1742 to, *Richard Fiddeman*. The plaintiff then offered evidence to prove, that the defendant was the surveyor who originally located and surveyed the tract called *Neglect*, for *William Hambleton* the patentee thereof; and for the purpose of proving the original location and survey of that tract, and that it began at the place described on the plots by the black letter F, and from thence run to the place described on the plots by black letter G, to the tract of land called *Elliott's Folly*, as located by the plaintiff, and from thence run with *Elliott's Folly* to the place described on the plots by black letter H, to the tract called *The Meadows*, as located by the plaintiff, and from thence, &c. &c. he offered to read in evidence the following written deposition of *Edward N. Hambleton*, the defendant, which had been before sworn to and subscribed by him, and taken by the sheriff of *Talbot* county on the 5th of April 1799, in an action then depending in the county court between *William Hambleton*, plaintiff, and *Samuel Tenant*, defendant, viz. The witness summoned and sworn at the request of the defendant, "deposeth and saith, that he the deponent sometime past run out a tract of land called *Neglect*, but the deponent cannot tell at this time the exact spot where he began the land called *Neglect*, but for further information refers to the certificate on the survey. And the deponent further says, that he cannot recollect what allowance was made on laying down the tract of land called *Martingham Enlarged*, and for further information refers to the certificates of said lands called *Martingham Enlarged* and *Neglect*. Question—Did you measure the first line of *Neglect*, and find that 17 perches intersected the N E line of *Elliott's Folly* as you then located *Elliott's Folly*? The deponent answers, he did. Question—Did you measure the second line of *Neglect* along with *Elliott's Folly*, as you then located *Elliott's*

*Folly*, and find that 48½ perches intersected the first line of the land called *The Meadows*, as you then located *The Meadows*? The deponent answers, he did. *Question*—Did you measure the third line of *Neglect* with the first line of *The Meadows*, and find it 32 perches to the end of the first line of *The Meadows*? The deponent answers, he did. *Question*—Did you measure the fourth line of *Neglect*, still with *The Meadows*, and find it 58 perches to the land called *Martingham Enlarged*? The deponent answers, he did; and that the above answers are intended to correspond with the certificate of *Neglect*, as he cannot charge his memory with any of the above questions. *Question*—How did you locate *Elliott's Folly* when you made this survey called *Neglect*; did you lay it down course and distance merely from the first boundary? The deponent answers, he doth not recollect. *Question*—Was you governed by any other boundary but the beginning boundary in laying down *Elliott's Folly*? The deponent answers, he doth not know the beginning boundary of *Elliott's Folly*. *Question*—Was you not shown a boundary of *Elliott's Folly*? The deponent answers, he was shown a boundary of *Elliott's Folly*, but he doth not recollect by whom. *Question*—Was you directed in what manner to lay down *Elliott's Folly* by the plaintiff in this cause? The deponent is not certain, but believes he was. *Question*—Did you run to any more than one boundary when you laid down *Elliott's Folly*? The deponent cannot recollect, but refers to the certificate of *Neglect*. *Question*—Who were your chain-carriers when you made the survey called *Neglect*? The deponent says *Francis Sinclair* and *James Harrison*. *Question*—Did you give a tract of land called *Fiddeman's Discovery* any location at all when you made this survey called *Neglect*? The deponent answers, not that he recollects. *Question*—Have you any knowledge of a corner tree, or any other mark of a tract of land called *Cambridge*, the first boundary excepted? The answer is, he hath not." The defendant objected to the reading of this deposition, alleging that it was illegal and incompetent evidence, and that it was in the nature of *parol evidence* tending to contradict, or substantially vary, the legal operation of the patent of the land called *Neglect*. The County Court, (*Earle, Ch. J.*) sustained the objection, and rejected the

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evidence. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before POLK, NICHOLSON, and JOHNSON, J.

*Bullitt and Goldsborough*, for the Appellant, said that the question depended on the true location of the land called *Neglect*, that there was a latent ambiguity in the grant of that land, and therefore that the parol evidence offered ought to have been received to explain it. They referred to *Peake's Evid.* 115, 123.

*Hammond and Kerr*, for the Appellee, referred to 3 *Woodes*. 327, 328. 2 *Esp. Dig.* 506, 507, 521, 525, 526, 527. *Meres, et al. vs. Ansell, et al.* 3 *Wils.* 275. *Pow. on Cont.* 431, 432, 435. *Brown vs. Selwyn, Ca. temp. Talb.* 240. *Lee vs. Biddis*, 1 *Dall. Rep.* 175. *Bond vs. Haas's Ex'rs.* 2 *Dall. Rep.* 133. *Clarke vs. Russell*, 3 *Dall. Rep.* 415. *Jackson vs. Shearman*, 6 *Johns. Rep.* 19. *Spalding's Lessee vs. Reeder*, 1 *Harr. & M'Hen.* 187. *Rich vs. Jackson*, 4 *Brown's C. C.* 514. *Land Hold. Ass.* 402. *Jackson vs. Cator*, 5 *Ves.* 688. *Jackson vs. Bowen*, 1 *Caine's Rep.* 358. 2 *Bac. Ab. tit. Evidence*, (G). *Bull. N. P.* 296, 297. *Finney vs. Finney*, 1 *Wils.* 34. *Mease vs. Mease*, *Cowp.* 47. *Preston vs. Morceau*, 2 *W. Blk. Rep.* 1249. *Butcher vs. Butcher*, 4 *Bos. & Pull.* 115, 116. *Lord Ingham vs. Child*, 1 *Brown's Ch. Ca.* 93; and *Dougherty vs. Denny*, 3 *Harr. & M'Hen.* 430.

THE COURT were of opinion, that if the different tracts of land called for by *Neglect*, were surveyed by course and distance, when that survey was made, that the grant of that tract passed no other land than was included in the survey as so made, and that the parol evidence in relation to the survey ought to have been received.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

MANN VS. THE STATE use of THOMAS.

1811.

DEC. (E. S.)

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vs  
The State

APPEAL from *Kent County Court*. Debt on bond, dated the 10th of April 1802, executed to the state by the defendant. (now appellee,) as administratrix *de bonis non* of *Ann Smith*, deceased. The writ issued on the 26th of February 1803. The defendant pleaded general performance. The replication set forth that *Ann Smith*, deceased, by her will bequeathed to her granddaughter, *Elizabeth Woodall*, now *Elizabeth Thomas*, (at whose instance and for whose use the original writ in this cause is endorsed,) the sum of £30, to be paid to her at her day of marriage. That *Ann Smith* appointed *George Vansant Mann*, since also deceased, her executor; and after his death letters of administration *de bonis non*, with the will annexed, were granted on the 10th of April 1802, to the defendant. That assets came to the hands and possession of *G. V. Mann*, the executor, in his life-time, and to the hands and possession of the defendant, the administratrix *de bonis non*, sufficient to pay and satisfy as well the debts of *Ann Smith*, as also all the legacies bequeathed by her will. That *Elizabeth Woodall*, the granddaughter of *Ann Smith*, and legatee aforesaid, afterwards intermarried with *William Thomas*, since deceased; and that the said legacy bequeathed to her as aforesaid, or any part thereof, not having been paid and satisfied, either to the said *Elizabeth*, whilst she was sole, or to *William Thomas* in his life-time, after their intermarriage, or to either of them, became due and payable to the said *Elizabeth Thomas*. The defendant rejoined to the replication, that the original writ in this cause was sued forth before the end or expiration of twelve months from the date of the letters of administration of the defendant. To this rejoinder there was a demurrer, which the court ruled good, and the defendant was ordered to answer over. The defendant then rejoined payment of the legacy; and also that no assets came to her hands; upon which issues were joined.

Upon action on an administration bond executed by an administrator *D. B. N.* brought to recover a legacy, the defendant rejoined, that the writ issued before the expiration of 12 months from the date of her letters of administration. A demurrer thereto was ruled good.

A S. by her will in 1775, bequeathed a legacy to E. W., to be paid to her on her day of marriage, and made G. M. her residuary legatee and executor, who returned an inventory in 1776, and settled an account with the orphans court, leaving a large balance due to the estate. After his death letters of administration *D. E. N.* were granted to A. M., who returned no inventory, nor settled any account, but it was proved that sundry negro slaves, included in the inventory returned by G. M., after his death came to the hands of A. M. On an action brought against A. M. on her administration bond to recover the legacy bequeathed to E. W.—*Held*, that the above testimony was sufficient to support the issue joined on the part of the plaintiff of no assets.

At the trial the plaintiff produced the will of *Ann Smith* dated in 1775, whereby amongst other things she bequeathed to her granddaughter, *Elizabeth Woodall*, £30, to be paid to her at her day of marriage, and she appointed *George V. Mann* her executor, and made him residuary

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legatee. The plaintiff also produced the letters testamentary granted to *George V. Mann* on the said estate, together with the inventory returned in 1776, amounting to £525 10 4, and proved by witnesses that sundry negroes, included in the inventory, were in the hands of *Mann* at the time of his death, and that said negroes are now in the hands and possession of the defendant. The defendant then produced the testamentary bond on the estate of *Ann Smith*, given by *Mann*, dated the 1st of March 1776. Also an account passed on the estate of *Ann Smith* by *Mann*, leaving a balance due the estate of £553 0 8. And proved by the register of wills, that no other account appeared in his office. She also proved by the register of wills, that no inventory was returned by her on the estate of *Ann Smith*; and that *George V. Mann* died in 1802. She then prayed the court to direct the jury, that the testimony produced was not sufficient to support the last issue joined in this cause. But the Court, [*Worrell, A. J.*] refused to give such instruction. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before *POLK, NICHOLSON, and JOHNSON, J.* by

*Barroll and Carmichael*, for the Appellant; and by  
*James Scott and Houston*, for the Appellee.

JUDGMENT AFFIRMED.

Dec. (E. S.)

THE STATE use of THOMAS vs. MANN.

A S by her will bequeathed to A W a legacy to be paid to her at her day of marriage; but if she died without lawful issue of her body, then the legacy was to fall over and be paid to E W. A W afterwards married G J, since deceased, and A W is also since deceased, intestate, and without issue—*Held*, that the legacy vested in A W, and that the limitation over was void.

APPEAL from *Kent County Court*. This action was similar to the preceding, and on the same bond. The replication to the plea of general performance stated, that *Ann Smith*, by her will bequeathed to her granddaughter *Ann Woodall*, (who is since deceased,) the sum of £30, to be paid to her at her day of marriage; but if she should die without lawful issue of her body, that then and in such case the testatrix did bequeath, order and direct, that the legacy aforesaid should fall over and be paid to the said *Ann Woodall's* sister, a certain *Elizabeth Woodall*, now *Elizabeth Thomas*, at whose instance and for whose use this action was brought. That *Ann Smith* appointed *George*

*V. Mann*, since also deceased, her executor, &c. That *Ann Woodall* afterwards intermarried with *George Jackson*, since deceased, that the said *Ann* hath since died intestate, and without issue; and that the said legacy, or any part thereof, not having been paid and satisfied either to the said *Ann*, whilst she was sole, or to *George Jackson* in his life-time, after their intermarriage, or to either of them, became due and payable to the said *Elizabeth Thomas*. The defendant rejoined to the replication, that the original writ in this cause was sued forth before the end or expiration of twelve months from the date of the letters of administration granted to the defendant on the estate of *Ann Smith*. To this rejoinder there was a demurrer, which the court overruled, and gave judgment for the defendant. The plaintiff appealed to this court.

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Downes  
vs  
The State, &c.

The cause was argued before *POLK, NICHOLSON, and JOHNSON, J.* by

*James Scott* and *Houston*, for the Appellant; and by  
*Carmichael*, for the Appellee.

The questions were, that if the legacy vested in *Ann Woodall*, then the limitation over was void, or if the suit was brought before it ought to have been, then the judgment ought to be affirmed. The decision was upon the ground that the limitation over was void.

JUDGMENT AFFIRMED.

DOWNES VS. THE STATE, use of *TILDEN, et ux.* DEC. (E. S.)

APPEAL from *Queen-Anne's County Court*. Debt on an administration bond, executed to the state on the 30th of October 1790, by *Jacob Clayland*, as administrator *de bonis non*, (*Elizabeth Costin*, deceased, having been the executrix,) of *John Costin*, with the will annexed, with *John Price*, and the defendant, (now appellant,) as his sureties. The defendant pleaded general performance by *Clayland*; also a general performance by *Clayland*, in his lifetime, and by his executrix since his death; to which pleas non performance was replied, and the breach assign-

In an action on an administration bond given by J G, as administrator *D B N* of J C, of the goods unadministered by E C, the former executrix, to the plaintiff's replication that there remained in the hands of J G 1217 17, clear personal estate, after payment of debts, due and payable to A, the daughter of J C, the defendant rejoined, that E C did, as the guardian of A, receive, and as executrix of J C did pay and satisfy to herself, as guardian of A, the said sum of 1217 17. Demurrer thereto ruled good; but on appeal reversed.

Where the balance due on an account passed by E C, as executrix of J C, was 1277 14 1, and the amount of the inventory returned by J G as administrator *D. B. N.* was 1214 2 6, the county court refused to direct the jury that the sum of 63 11 7, the difference between those two sums is to be taken as part payment to E C of her one third share of the personal estate bequeathed to her by J C.

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*The State, &c*

ed in each replication, was the nonpayment of all that part of *John Costin's* personal estate which was bequeathed by him, after the payment of his debts, to be equally divided between his wife *Elizabeth Costin*, and his two daughters, *Sarah* and *Ann*, and their assigns, for ever; but if either of his daughters should die before the age of 16 years, or day of marriage, that then the survivor should have her sister's part thereof to her and her assigns for ever. Averment, that *Sarah*, one of the legatees, departed this life under the age of 16 years, and unmarried, whereby the said third part of the whole of the personal estate of *John Costin*, so bequeathed to the said *Sarah*, became due and payable to the said *Ann*; and the other third part of the said remaining part of *John Costin's* personal estate became due and payable to the said *Ann* by the will of the said *Costin*; which said *Ann* intermarried with *M. Tilden*, at whose, and the said *Anne's* instance, this suit was brought. That there remained in the hands of *Clayland* the sum of £217 1 7, clear personal estate, which was of the said *Costin* after the payment of his debts, and satisfying *Elizabeth Costin* her third part of the whole estate bequeathed to her by her husband, which said sum became due and payable to the said *Ann* in manner aforesaid, by the will of the said *John Costin*, and by the death of her sister *Sarah*, &c. Rejoinder to the first replication, that *Elizabeth Costin*, the executrix of *John Costin*, who took upon herself the burthen of executing the same, was by the will of *John Costin* constituted guardian to the said *Sarah* and *Ann*, and accepted of the trust and guardianship; and that she did, as guardian of the said *Sarah* and *Ann*, receive, and as executrix of *John Costin* did pay and satisfy, to herself as guardian of the said *Sarah* and *Ann*, the said sum of £217 1 7. Rejoinder to the second replication, that there did not remain in the hands of *Clayland*, of the clear estate of *Costin* unadministered by *Elizabeth Costin* after all payments, &c. the sum of £217 1 7 due to the said *M. Tilden*, and *Ann* his wife; nor did there remain in the hands of *Clayland*, due to *M. Tilden* and *Ann* his wife, any sum of money whatever. Upon this rejoinder issue was joined. To the rejoinder to the first replication there was a demurrer, which the county court ruled good.

At the trial of the issue in fact, the plaintiff produced an account passed by *Elizabeth Costin*, as executrix on *John*

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*Costin's* estate, leaving a balance due to the estate on the 13th of June 1789, of £277 14 1, and proved by the register of wills that no other account was passed by her. The plaintiff also offered in evidence the will of *John Costin*, dated the 26th of March 1784, in which, among other devises and bequests, is the following: "*Item*. I give and devise my whole personal estate, of what nature soever, after my just debts are discharged in manner aforesaid, to be equally divided between my aforesaid wife, and two daughters *Sarah* and *Ann*, and their assigns. for ever, but if either of my daughters shall die before the age of sixteen years, or day of marriage, then the survivor shall have her sister's part thereof to her and her assigns for ever." "I do hereby constitute and appoint my said wife guardian of my said daughters, and every of them, and to have the care of their respective estates until they respectively arrive at the age of sixteen or day of marriage; and lastly, I do constitute and appoint my said wife executrix of this my last will and testament." The plaintiff also produced the inventory returned on the 3d of November 1790, by *Jacob Clayland* on the estate of *John Costin*, amounting to £214 2 6. And prayed the court to give the following instruction to the jury. If the jury shall believe that *Elizabeth Costin* received from the estate of *John Costin* a sum of money beyond what was paid away in the course of her administration, and that she held in her hands, unapplied to *John Costin's* estate, to the amount of £277 14 1 unaccounted for at her death, and that the amount of the property which came to the hands of *Jacob Clayland*, administrator *de bonis non* of *John Costin*, amounts to £214 2 6, that the sum of £63 11 7, the difference between the balance of her last account, and the inventory of the administrator *de bonis non*, is to be taken as part payment of her share of the *residuum* of *John Costin's* personal estate bequeathed to her under his will. But the Court, [*Worrell*, A. J.] refused to give such instruction, being of opinion that *Elizabeth Costin*, under her bond, was liable for that sum. Verdict for the plaintiff, and damages assessed to £290 13 8. Judgment was rendered upon the verdict for the plaintiff, and the defendant appealed to this court.

The cause was argued before *POLK*, *NICHOLSON*, and *JOHNSON*, J.

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*Bullitt*, for the Appellant. By the bond given by *Clayland*, his suréties could only be liable for what came to his hands of the estate of *John Costin*, unadministered by *Elizabeth Costin*. *Clayland*, himself, if he received the property, was liable, but not as administrator *de bonis non*, or under the bond. The general demurrer to the rejoinder, that *Elizabeth Costin* was the guardian of *Ann*, accepted the trust, and paid over the money she received as executrix, to herself as guardian, admits the facts; therefore she did pay over the money; and no presumption is necessary of the payment over, as the demurrer admits it. After the lapse of a year the legacy vested, or must be presumed to have been paid over to the guardian. He cited 2 *Harr. Ent.* 228; 329. *Harris vs. Wright*, (decided in the late general court.) 2 *Bac. Ab.* 386; and *Quynn vs. The State, use Pue, et al.* 1 *Harr. & Johns.* 36.

*Carmichael*, for the Appellee.

JUDGMENT REVERSED:

DEC. (E. S.)

THOMAS'S EX'X. vs. DENNING, use of PAGE.

The admissions of the assignor of a bond, made subsequent to the assignment, of payments in part of the bond having been made to him, are admissible in evidence.

APPEAL from *Kent County Court*. Action of debt, brought on the 13th of April 1804, on a bond executed by the testator of the defendant, (now appellant,) to the plaintiff *Denning*, (now appellee,) on the 22d of September 1792, conditioned for the payment of £400 current money on the 1st of January 1796, with interest from the 1st of January 1793. The defendant pleaded payment. At the trial the defendant produced an account stated between *Denning* and the defendant's testator, in which the former was charged with sundry sums of money due to the latter, commencing on the 1st of January 1793, and ending on the 1st of January 1794, and credit given on the 1st of January 1793, of a bond for £300, and interest thereon to the 1st of January 1794; also with a bond in October 1792, with interest from the 1st of January 1793, and payable the 1st of January 1796, for £400, and also with the interest thereon from the 1st of January 1793, to the 1st of January 1794, leaving a balance due on that account from *Thomas* to *Denning* of £73 11 9½, to which account was the following acknowledgment, signed by *Denning* (and proved to be his handwriting,) on the 2d of

September 1794, "I do hereby acknowledge the above and within statement to be just and true, and the several sums of money herein stated to have been paid by *William Thomas*, I acknowledge to be right and agreeable to my several orders drawn on him, which said orders were drawn by me previous to my assigning his bonds, herein credited, to *Mrs. Mary Woodland*; and that I have received no money, nor drawn any orders on him on account of the said bonds, since the assignment of said bonds to the said *Mary Woodland*." The plaintiff then produced the original bond, which had not been filed in the cause, but gave no evidence of the assignment upon the same, signed *George Denning*, and objected to the said paper containing the said account, and the receipt of the same, going in evidence to the jury. And the Court, [*Earle*, Ch. J. and *Worrell*, A. J.] were of opinion, that the same was not proper and admissible evidence to go to the jury, being of opinion that the admissions of the assignor, made subsequent to the assignment, as evidenced in the acknowledgment itself, of payments made to him, ought not to be received as testimony to the prejudice of the rights of the assignee. The defendant excepted; and the verdict and judgment being against her, she appealed to this court.

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The cause was argued before *POLK*, *NICHOLSON*, and *JOHNSON*, J.

*Carmichael* and *Murray*, for the Appellant, contended,

1. That there was no sufficient evidence of the assignment of the bond to *Woodland*, under whom *Page* claimed;
2. The declarations of *Denning* were evidence. They cited *Chitty's Plead.* 6. *Bauerman vs. Radenius*, 7 T. R. 662; and *Peake's Evid.* 164.

*Houston* and *Barroll*, for the Appellee.

JUDGMENT REVERSED.

HAWKINS'S LESSEE VS. GOULD.

DEC. (E. S.)

APPEAL from *Queen Anne's County Court*. Ejectment for a tract of land called *Macklinborough*. Defence on

of the one part, and J P of the other part, and that T W, with the consent of J W his wife, in consideration of, &c. granted, &c. to J P, and his heirs, a parcel of land, and signed and sealed by T W and J W his wife, and acknowledged by them in open court, "the said J being first privately examined as the law requires"—Held to be in operative to pass a fee from J W to J P, she not being a grantor in the deed.

A deed executed in 1683, and stated to be made between T W, and J W his wife,

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warrant, and plots returned. At the trial the plaintiff, (now appellant,) read in evidence the certificate and patent of the tract of land called *Macklinborough*. He also traced his title from the patentee to a certain *Judith Howden*, who he proved to have intermarried with one *Thomas Wyatt*; and then read the following deed from *Thomas Wyatt*, and *Judith* his wife, to *John Parsons*, to prove an alienation of her title to *Parsons*, and his heirs, for ever, viz. "Among the land records of *Talbot* county, among other things the following is enrolled, to wit, *Thomas Wyatt*, and *Judith Wyatt* his wife, the said *Judith* being first privately examined as the law requires, come before the court, and did acknowledge this following deed of sale unto *John Parsons*: This indenture made the 16th day of November, in the eighth year of the Dominion of *Charles*, absolute Lord and Proprietary of the Provinces of *Maryland* and *Avalon*, Lord Barron of *Baltimore*, &c. 1683, between *Thomas Wyatt*, and *Judith Wyatt* his wife, of the one party, and *John Parsons* of the other party, both inhabitants in *Talbot* county, in the aforesaid province of *Maryland*—Witnesseth, that *Thomas Wyatt*, with the consent of *Judith Wyatt* his wife, for and in consideration of five thousand and eight hundred pounds of tobacco, to him in hand already, before the sealing and delivery hereof to the said *John Parsons*, the receipt whereof he doth acknowledge, and for every part thereof doth hereby absolutely and clearly exonerate, acquit and discharge, the said *John Parsons*, his heirs, executors, administrators and assigns, and by these presents hath given, granted, bargained, alienated, sold, enfeoffed and confirmed, unto him the said *John Parsons*, his heirs and assigns, for ever, a parcel of land lying and being in *Chester* river, and in *Talbot* county, and in the said province of *Maryland*, beginning at," &c. "containing and now laid out for one hundred and ninety and nine acres, more or less; to have and to hold the said lands for ever, together with all ways, easements and priviledges, to the same belonging or appertaining, together with all writing, deeds, charters, devildents, touching or concerning or any part or parcel thereof, to have and to hold the said parcel of land according to the bounds above mentioned, together with all meadow or feeding pasture grounds, underwoods, water courses, fishing, fowling ways, profits, commodities, commons of

pastures, hereditaments whatsoever, to the said lands, the said lands being lately in the tenure or occupation of the said *Thomas Wyatt*, and also all the estate, right, title and interest, use or possession, property, claim and demand whatsoever, of him the said *Thomas Wyatt*, of, in and to, the same, with all writings, and all deeds, evidences, charters, transcripts, fines, pattents, court rolles, excerpts and muniments whatsoever, touching and concerning the premises, or any part or parcel thereof, to have and to hold, and shall and will, forevermore, warrant and defend by these presents; and the said *Thomas Wyatt*, at the time of ensealing and delivery hereof, of these presents, is and standeth, is, and until a good pure and perfect and absolute estate of inheritance of all and singular the before granted premises, and every part thereof, shall be fully vested, settled and executed, in and upon the said *John Parsons*, and his heirs, according to the true intent and meaning of these presents, shall remain, continue and be seized, of and in the said lands, and all and singular other the premises, in and by these presents granted, bargained and sold, with all and every of these rights and appertenances, and members, of a good, perfect and absolute estate of inheritance, in fee simple, without any condition or limitation of any use or user, or estates, in or to any person or persons whatsoever, to alter, change, defeat, determine, or make void the same; and that the said *Thomas Wyatt*, at the time of ensealing and delivery of these presents, hath full power, good right, and lawful authority, to grant, bargain, sell, and convey, and all and singular the before hereby granted or mentioned premises to be granted, premises with their and every of their rights and appertenances, unto the said *John Parsons*, his heirs and assigns, in manner and form aforesaid; and that he the said *John Parsons*, his heirs or assigns, and every of, shall and may, by force and virtue of these presents, from time to time, and of all times hereafter, lawfully, peaceably and quietly, have, hold, occupy, possess and enjoy, the said lands, and all and singular the before granted premises, with their and every of their rights, members and appertenances, to have, receive and take, the issue and profits thereof, to his and their own proper use and behoof for ever, without any lett, suit, trouble, denial, interruption, eviction or disturbance, of the said *Thomas Wyatt*, his

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heirs or assigns, or of any other person or persons whatsoever, lawfully claiming from or by, or under him, or any of them, or by his or their means, act or consent, title, interest, privity or procurement, and that free and clear, and freely and clearly acquitted, exonerated and discharged, or otherwise, from time to time well and sufficiently save and keep harmless by the said *Thomas Wyatt*, his heirs, executors or administrators, of and from all manner of fines, or other gifts, grants, bargains, sales, leases, mortgages, joynters, dowers, title of dower, statute merchants, and of staple, recognizance, extents, judgments, executions, uses, entailes and issues, with all other titles, troubles, incumbrance whatsoever. In witness whereof the before named *Thomas Wyatt*, and *Judith Wyatt* his wife, of the one party, and *John Parsons* of the other party, hath interchangeably set their hands and seals the day and year above written.

Signed, sealed and delivered,	}	his
ed, in the presence of us.		<i>Thomas X Wyatt</i> , [Seal.]
<i>John Punowes</i> ,	}	mark
his		her
<i>Richd. X Bridge.</i> "		<i>Judith X Wyatt</i> , [Seal.]
mark		mark

This deed was certified by the clerk of *Tulbo* county court to be copied from one of the land records of that county. The plaintiff also read in evidence a deed from *John Parsons* to *John Hamer*, and one from *John Parsons* and *Dameras Parsons* his wife, to *John Hamer*. He then read in evidence the will of *John Hamer*, devising his dwelling plantation to his daughter *Mary Hamer*, and proved that a certain *Mary Hayer* married one *John Chaires*, and by him had two sons *John Chaires* and *James Chaires*, of whom *John Chaires* was her eldest son and heir at law; that she survived her said husband *Chaires*, and intermarried with a certain *Solomon Clayton*, and after his death she became the wife of one *Edward Downes*, and died the widow of *Downes* in the year 1779. The plaintiff also proved by a witness, that he, the witness, was at the funeral of the said *Mary Downes*, and when he had returned home with her mother, who is now dead, he was informed by her, that the maiden name of the said *Mary Downes* was *Hamer*, but that he did not remember to have understood from her that

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the said *Mary Downes* was the daughter of *John Hamer*. The plaintiff also proved by said witness, that the late *John Chaires*, deceased, who was sometimes called Preacher *John*, was the eldest son of the above named *John Chaires*, son of the said *Mary Downes*, and that the said *Mary Downes*, at her decease, was a very old woman. By another witness—that many years ago he lived in the family of the above named *Mary Downes*, and that he constantly understood from her and others, that preacher *John Chaires* was her grandson, the son of her eldest son *John Chaires*, at that time deceased; and that the plantation in *Johnny Cake Neck*, held by the said *Mary Downes*, she delivered up to her said grandson in her life-time. Which last mentioned evidence was offered, not to prove a possession in the plantation aforesaid, but merely to show that *John Chaires*, preacher, was grandson and heir at law of *Mary Downes*. The plaintiff then read in evidence a deed from the said preacher *John Chaires*, to the lessor of the plaintiff. When the plaintiff had thus traced his title from the patentee, the defendant moved the court to instruct the jury, that the above mentioned deed from *Thomas Wyatt* and *Judith* his wife, to *John Parsons*, was inoperative to pass a fee from *Judith Wyatt* to *John Parsons*, she not being a grantor in that deed, and that there was a chasm in the evidence, and that the plaintiff, who is to recover on the strength of his title, could not therefore support his ejectment. The court, [*Purnell, A. J.*] was of opinion, and did so state to the jury, that the said deed from *Thomas Wyatt* and *Judith* his wife, to *John Parsons*, was ineffectual to pass the fee simple estate to *John Parsons*, the said *Judith* not being a grantor in the said deed, and that the title of the plaintiff was not fully made out. The plaintiff excepted; and the verdict being against him, he appealed to this court.

The cause was argued before *POLK, NICHOLSON*, and *JOHNSON, J.*

*Carmichael*, for the Appellant, contended, that a different construction will be given to a deed of 1683 from what would be given to a modern deed; and although the deed in question would be invalid if a recent one, it was

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valid as an ancient deed. He referred to 2 *Blk. Com.* 298, 379, 380: *Wright vs. Kemp*, 3 *T. R.* 470; and *Langdon vs. Goole*, 3 *Lev.* 21. In the deed, the name of *Judith Wyatt* is inserted in the premises. *Lord Say and Seal's* case, 10 *Mod.* 46. That if the deed was originally invalid it was made valid by the acts of 1674, *ch. 2, s. 4*, and 1715, *ch. 47, s. 4*:

*Kerr*, for the Appellee The deed is incompetent to pass the fee in the land from *Judith Wyatt*, either at common law or under the acts of assembly. It does not, on the face of it, purport to pass any interest except that of the husband. 1. *Judith Wyatt* has not granted. 2. If she did, yet the deed was not properly acknowledged.

1. *Judith Wyatt* doth not grant either in the premises, or in the *habendum*. 2 *Blk. Com.* 298. If the deed can operate, it must be as a deed of bargain and sale. It cannot operate as a bargain and sale, for there is no *money consideration*. 1 *Blk. Com.* 464. *Gittings's Lessee vs. Hall*, 1 *Harr. & Johns.* 14. *Chaney's Lessee vs. Watkins*, *Ibid* 527. The words of the conveyance, must express the extent of the interest to be passed. *Wood's Convey.* 228, 239. The deed must be sealed and delivered by the party contracting. *Co. Litt.* 35, b. There must be a grantor, grantee, and a thing granted. 2 *Blk. Com.* 296, 297. *Wood's Convey.* 236.

2. The deed was not executed and acknowledged by *Judith* as the acts of assembly required. 1 *Bac. Ab.* 467. *Wood's Convey.* 167, 169. *Webster vs. Hall*, 2 *Harr. & M. Hen.* 19. *Flanagan vs. Young*, *Ibid* 38. *Lewis vs. Waters*, 3 *Harr. & M. Hen.* 430. *Mayson's Lessee vs. Sexton*, 1 *Harr. & M. Hen.* 276; and *Hammond's Lessee vs. Brice*, *Ibid* 323, 333. It is not stated when the deed was recorded.

*Carmichael*, in reply. The deed was acknowledged in open court, and therefore the form of the acknowledgment need not appear. It is also aided by the act of 1807, *ch. 52*. The deed was recorded in time, for having been acknowledged in court it was left with the clerk to be enrolled, and his omission of the time of enrolment will not invalidate it.

JUDGMENT AFFIRMED.

## QUIMBY VS. WROTH.

1811.  
DEC. (E. S.)Quimby  
vs  
Wroth

APPEAL from Kent County Court. Action of replevin for a negro slave named *Joseph*. The writ issued on the 11th of March 1809. The defendant, (now appellant,) pleaded, 1. Property in himself. 2. *Non cepit infra tres annos*; and 3. *Actio non accrevit infra tres annos*. General replication and issue joined to the first plea. To the second plea, the plaintiff, (the appellee,) replied, that the defendant had for three years held the possession of the negro man, under the pretence that the right of property was not in the plaintiff, but that he acknowledged himself content that the plaintiff should recover the possession of the negro, provided he had the right and the property in him. To the third plea he replied, that the cause of action did accrue within three years, to wit, on the 20th of March 1806. Rejoinder to the second replication, that he the defendant held the negro for more than three years in his own right and property, and hath never, at any time within three years, acknowledged himself content that the plaintiff should recover possession. Surrejoinder, protesting that the facts stated in the replication are true; and joins issue that the defendant hath within three years acknowledged himself content, &c. *Verdict*, 1. That at the time of taking, &c. the property of the negro was in the plaintiff. 2. That the defendant "did not hold possession of the negro under the pretence that the right and property was not in the plaintiff, but hath acknowledged himself content that the plaintiff should recover possession of the negro, provided the plaintiff should prove the right and property of the negro to be in him the plaintiff." 3. That the cause of action did accrue within three years.

1. At the trial the plaintiff produced *John Willis* as a witness, and offered to prove by him that the negro man named *Joseph*, mentioned in the declaration, was held by a certain *James Wroth*, who by his last will and testament, dated the 7th of October 1784, bequeathed the same negro to the plaintiff, to remain in his mother's care, and for his use, until he arrived at age; which will he read in evidence. And that the witness afterwards intermarried with *Ann Wroth*, the wife of *James Wroth*, the testator, and at that time the said negro was in the possession of the said *Ann Wroth*, the wife of the said testator, and the mother of the plain-

In replevin for a negro, where the act of limitations was relied on, the plaintiff, in order to prevent the operation of that act, proved by a witness that the defendant, after the institution of the suit, said "that if the negro did not belong to him, he did not want him, and no property he had was his, and that no law suit was necessary." The competency of the witness was objected to, and evidence was given that he had sold the negro of J. W., under whom the defendant claimed him by a bill of sale dated in 1792, with a general warranty; but it was proved that the witness was in that year discharged under an insolvent law—*Held*, that the witness was competent, and the evidence was permitted to be given to the jury.

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tiff. He further offered to prove by the same witness, whom he showed had been discharged by the insolvent law in the year 1792, that he had heard the defendant say, since the original writ impetrated in this cause, "that if negro *Joseph* did not belong to him he did not want him, and no property he had was his, and that no law suit was necessary." The defendant then objected to the competency of the said witness, and produced his deed to *James Wroth*, junior, under whom the defendant claims, dated the 10th of August 1792, whereby, in consideration of £120, *Willis* the witness granted, &c. unto *J. Wroth*, all his goods and chattels, &c. and amongst others the said negro *Joseph*, &c. with a general warranty. This deed of sale was duly acknowledged and recorded. But the court, [*Worrell*, A. J.] was of opinion, that the witness was competent, and that the testimony was proper. The defendant excepted.

2. The plaintiff then offered to prove by *John Willis*, a witness sworn, that he had heard the defendant in August 1809 say, that if negro *Joe*, the negro named in the declaration, was not his, he had no property, and that he did not want him, and that no law suit was necessary. To this testimony the defendant objected; but the court permitted the same to be given to the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *POLK*, *NICHOLSON*, and *JOHNSON*, J.

*Carmichael*, for the Appellant, referred to *Galligher vs. Hollingsworth*, 3 *Harr. & M. Hen.* 122; and *Peake's Evid.* 300, 307.

*Chambers*, for the Appellee, cited *Morris's Lessee vs. Vanderen*, 1 *Dall. Rep.* 65. *Bent vs. Baker*, 3 *T. R.* 27. *Walton vs. Shelley*, 1 *T. R.* 298, 301. *Jordaine vs. Lashbrooke*, 7 *T. R.* 601. *Oxenden vs. Pencerice*, 2 *Salk.* 691; and 1 *Selw. N. P.* 321.

THE COURT concurred in opinion with the court below on both the bills of exceptions, and

JUDGMENT AFFIRMED.

SPEDDEN VS. THE STATE, use of MARSHALL, et ux.

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DEC. (E. S.)

Spedden  
vs  
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APPEAL from Tulbot County Court. It was an action of debt brought upon the guardian bond of *Joseph Telford*, executed to the state, on the 11th of February 1820, to recover the balance of the estate due to his ward *Sophia Weaver*, for whose use and that of her husband the action was prosecuted. The defendant, (the appellant,) one of the sureties in the bond, pleaded two pleas. 1. General performance; and 2. That the guardian had accounted and paid, &c. To these pleas there were the general replications of nonperformance, with an assignment of breaches, and that the guardian had not accounted, &c. Issues were joined to the rejoinders to the replications.

1. At the trial in the county court, at May term 1808, the defendant offered in evidence certain accounts rendered by *Joseph Telford*, as guardian of *Sophia Weaver*, (the wife of *William Marshall*, at whose instance and for whose use this action was brought,) to the orphans court of *Talbot* county, passed and allowed by that court, and contended that the accounts, (there being no real estate of the orphan,) so passed and allowed, were conclusive evidence, as well on the guardian as the minor, to show what were the balances respectively due by *Telford* to *Sophia* his ward, at the several times when the accounts were passed and allowed by the orphans court; and that no other evidence was admissible on the part of the plaintiff to show that the accounts were erroneous, or that the orphans court had exceeded their authority, or had made improper or unreasonable allowances to the guardian; for that the accounts were the acts and judgment of the orphans court, having competent and conclusive jurisdiction over the subject matter of the accounts, and of the charges and allowances therein contained. The plaintiff then prayed the opinion and direction of the court to the jury, that the accounts so rendered to, and passed and allowed by, the orphans court, were not conclusive evidence as aforesaid, but that they were *prima facie* evidence only of the balances respectively due as aforesaid, and were open to examination by the court and jury; and that the plaintiff might give other evidence, to show that the accounts were

In debt on a guardian's bond, it was held that the accounts of a guardian rendered to, passed and allowed by the orphans court, were not conclusive evidence either on the guardian or his ward, but *prima facie* evidence only of the balances respectively due by the guardian to his ward at the several times when the accounts were passed and allowed, and were open to examination by the court and jury; and that the plaintiff might give other evidence to show that the accounts were erroneous, or that the orphans court had exceeded their authority, or had made improper or unreasonable allowances to the guardian, in the accounts.

The orphans court have no authority to allow a guardian for the maintenance and education of his ward for any period of time previous to his appointment; and the jury are not to make any such allowance.

The sums of money allowed by the orphans court to a guardian, for the board, clothing, and education of his ward, is not a final and conclusive ascertainment of the sums to be allowed to the guardian for the maintenance and education of the ward; but it is competent to the plaintiff to show by other evidence that the sums were improperly allowed by the orphans court, or that they were larger allowances than ought to be made to the

guardian for the maintenance and education of his ward.

Where the sum of money allowed by the orphans court to a guardian, for the maintenance and education of his ward, exceeded the annual income of the ward's estate, it was held that the guardian was concluded thereby, and that the jury could not exceed the sum so allowed to him.

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erroneous, or that the orphans court had exceeded their authority, or that the orphans court had made improper or unreasonable allowances to the guardian, in the accounts. And the county court, (*Purnell and Worrell, A. J.*) did so give their opinion, and direct the jury accordingly. The defendant excepted.

2. The plaintiff then gave in evidence a copy of the records of the orphans court of *Talbot* county, by which it appeared that *Joseph Telford*, (the principal obligor in the bond upon which this action was brought,) was appointed guardian to *Sophia Weaver*, on the 11th day of February, in the year 1800; and that the orphans court of *Talbot* county had allowed *Telford* for the board, clothing and schooling, of *Sophia*, for a certain period of time previous to the appointment of *Telford* as her guardian. The counsel for the defendant then offered to prove, by parol evidence, that *Sophia* had been actually maintained and educated by *Telford* for the whole period of time so allowed in the said accounts by the orphans court. The plaintiff then prayed the court, to direct the jury, that the orphans court had no power or authority to allow a guardian for the maintenance and education of the minor for any period of time previous to his appointment, and that the jury were not to make any such allowance. The court gave the direction. The defendant excepted.

3. The defendant then offered in evidence certain accounts rendered by *Telford*, as guardian of *Sophia Weaver*, to the orphans court of *Talbot* county, and passed and allowed by that court, in which accounts certain sums of money were charged against *Sophia*, for her board, clothing and schooling, for certain periods of time therein mentioned, and which had elapsed before the time when the accounts were passed and allowed, and which sums of money exceeded the yearly income, or interest, of *Sophia's* estate during the periods aforesaid; and the defendant contended, that the sums of money so charged in the accounts for board, clothing and schooling, of *Sophia*, though exceeding the said income or interest, being allowed by the orphans court, in and by their passing and allowing the accounts, is a final and conclusive ascertainment by the orphans court of the sums to be allowed to *Telford*, (the guardian,) for the maintenance and education of his ward, and that the jury were bound to allow them in this cause; and

the defendant prayed the court so to direct and give their opinion to the jury. But the court refused to give the direction; but on the contrary directed the jury, that the sums of money being charged and allowed by the orphans court, is *not* a final and conclusive ascertainment of the sums to be allowed to *Telford* for the maintenance and education of *Sophia*, but that it was competent to the plaintiff to show, by other evidence, that said sums were improperly allowed by the orphans court, or that they were larger allowances than ought to be made to *Telford*, for the maintenance and education of *Sophia*. The defendant excepted.

4. The plaintiff then gave in evidence, that the orphans court of *Talbot* county had allowed to *Telford*, as the guardian of *Sophia* his ward, in the accounts rendered by him, and passed by the orphans court, the sum of twenty-five pounds *per annum* during his guardianship, and that that sum exceeded the annual income of *Sophia's* estate. The defendant thereupon offered to show by evidence, that the sum so allowed by the orphans court, to *Telford*, for the board, clothing and schooling, of *Sophia*, during the time of his guardianship, were not reasonable allowances, or an adequate compensation to him for such board, clothing and schooling, during the time of his guardianship, and contended, that the jury had a right in this cause to exceed that allowance. Whereupon the plaintiff prayed the court to direct the jury, that inasmuch as the sum of twenty-five pounds *per annum* exceeded the income of the orphan, and had been allowed and ascertained by the orphans court, that the defendant was concluded thereby, and that the jury could not exceed the said sum; and the county court did so direct the jury. The defendant excepted. The verdict and judgment being for the plaintiff, the defendant appealed to this court. The cause was argued at a former term of the court.

*Kerr*, for the Appellant (*a*). The question stated in the first bill of exceptions is, Whether the accounts of a guardian, passed by the *orphans court*, (being the acts and judgments of a court having competent jurisdiction over the

(*a*) As this is a leading case, and as the Reporters have not been able to procure the opinion delivered by the Court, they have thought it advisable, (though contrary to their general custom,) to report the Arguments of the Counsel at length.

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subject matter of the accounts, and of the charges and allowances contained in them,) are conclusive evidence or not, where there is no real estate of the orphan? This question of the *general* conclusiveness of the accounts of a guardian, when passed by the orphans court, as to *all* the items contained in them, will appear, upon the least consideration, not to be the same point as that stated in the *third* bill of exceptions. A decision is understood to have been made in the late general court, on the question of the conclusiveness of the accounts of executors and administrators, passed by the orphans court, by which it was determined that such accounts, when produced on trials at law, were *prima facie* evidence only. How far this decision bears upon the true point raised in the *third* bill of exceptions, will be hereafter considered, when the distinction will be shown and proved between the *general* question of the conclusiveness of all judgments of the orphans court, and that of the peculiar act of ascertaining, in their discretion, an allowance to the guardian for the maintenance and education of the ward. But as it is presumed that the decision alluded to, not having been given by the highest law tribunal then existing, will not be considered binding on this court, the point may be still discussed upon the principles and authorities of the common law. Inasmuch as the orphans court have the distinguishing characteristic of a *court of record*—the *power of fine and imprisonment*—it is certainly at least doubtful whether their proceedings, in cases of which they have an express jurisdiction, can be questioned or controled. Why is the judgment of *any* court conclusive? Either because *it is a court of record*, or because *it has competent jurisdiction*. The truth of the records of a court of record must be tried by the records themselves, and there shall be no averment against the truth of the matter recorded. 2 Bac. Abr. tit. Courts, &c. (D 2,) 101. Every court having a power given it to *fine and imprison*, is thereby made a *court of record*, the proceedings of which can only be removed by *writ of error* or *certiorari*. *Ibid.* and the authorities there cited. By the act of 1798, ch. 101, sub ch. 15, s. 13, the orphans courts are expressly invested with a power to *fine and imprison*. So by s. 16, they are empowered to *fine and commit*. Since then these courts clearly possess the distinguishing powers of a court of record, “there can be no averment against the truth of

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the matters recorded;" but their proceedings, in all cases within their jurisdiction, are conclusive, except "they be corrected by appeal in the manner prescribed by law. By the act above cited, (*sub ch. 15, s. 12,*) an express jurisdiction is given to the orphans courts over the accounts between guardians and wards; and they are invested "with full power, authority and jurisdiction, to *examine, hear and decree, upon* all accounts, claims and demands, existing between wards and their guardians, &c. and may enforce obedience to their decrees in the same ample manner as the court of chancery may." Wherever a court has competent jurisdiction over the subject of their decision, such decision is conclusive. Thus the courts of common law in *England* give credit to the proceedings and sentences of the ecclesiastical courts, in matters in which they have a jurisdiction; and if there be a *gravamen*, it must be redressed by appeals. 2 *Bac. Ab.* tit. *Of the Ecclesiastical Courts*, (D) 171; (E) 174, and the cases there cited. So likewise of the court of chancery; "for it were very absurd that the law should give them a jurisdiction and yet not suffer what is done by force of that jurisdiction to be full proof." *Buller's N. P.* 243, 244. Even the judgments and decrees of *foreign courts*, having competent jurisdiction, are allowed to be conclusive. *Ibid* 244, 245. If, then, this case is to be tested by the only principles of law, and analogous decisions, which can be found in the books, we can suppose no other principle capable of breaking their force, except that of the impolicy of a construction which shall give to courts, *constituted* as our *orphans courts* are, the ample and uncontrolable powers contended for in this case. But if this court shall now see the question to be really reducible to this simple point of view, they will not hesitate a moment in deciding how far *policy* can be allowed in any degree to influence their deliberations. The power of *settling* the accounts of guardians, is a new and special jurisdiction given to the orphans court by the act of 1785, *ch. 80, s. 9*, and it is difficult to conceive why the legislature should have then raised this jurisdiction, without intending that the acts of these courts should be held as binding, judicial acts. For what purpose should these courts make a *settlement* of any guardianship account, if immediately afterwards every item of allowance or charge adjusted *in the discretion* given them by law might be altered or rescinded?

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Before this act of 1785, guardians were only liable to be called to account by the ward, on an *action of account*, in the courts of common law, or by bill in chancery. Indeed, previously to the act of 1729, *ch. 4, s. 2*, compelling guardians to account for the surplus profits of the real estate, it seems an idea prevailed; that *all* the profits belonged to the guardian; he maintaining the ward thereby.

The *second* bill of exceptions consists of two branches—*First*. Whether the orphans courts have any power to make an allowance to a guardian for the maintenance and education of the ward, *for any period of time previous to his appointment*. *Secondly*. Whether a jury, on evidence given to them that the ward had been actually maintained and educated, during that period, by the guardian, can make any allowance for it, the same having been allowed to the guardian by the orphans court?

On the first branch, the universal practice of the orphans courts to make such an allowance to a person who takes an orphan under his care, and expends his own money in his support, *in contemplation of becoming his guardian*, ought to be respected as a *custom, making a law*, inasmuch as it tends to the great advantage of unprotected orphans, and is an inducement to relieve them at a period when they most stand in need of assistance. A strong ground of *utility* like this ought to determine the construction on a doubtful point; and if even in strict law it appears to have been originally an error in the orphans courts to adopt such a practice, as it is so consonant to justice, and so uniform a rule, the courts in this case, as they have done in many others, may apply the maxim "*communis error facit jus*;" and they may certainly justify the adoption of such a maxim by an argument from the great inconvenience which would arise from a contrary construction, so many accounts standing upon the records, settled according to this rule. In numberless instances the executor or administrator of a deceased person has been necessarily led to take care of the infant children of the testator, or intestate, until it was ascertained whether any distributive share remained to them or not; and when they have thus expended their own money upon the orphans, in contemplation of becoming their guardians, (in the event of their being any property to attract a guardianship,) the orphans

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courts, in conformity to every principle of justice and good policy, make an allowance for that expenditure, in the subsequent accounts passed by such persons as guardians. Upon the same principle an allowance ought to be made to any other person who shall humanely undertake to investigate the rights of orphans, and meanwhile to protect and support them; and although *the record* does not show this to have been the fact in the present case, yet if any case can be supposed, in which the court would adjudge that such allowance could be made, the exception must prevail. But the other branch of the exception is maintainable in law—that *the jury, on evidence given that the ward had been actually maintained and educated by the guardian for a period of time previous to his appointment, may allow for it in their verdict.* The law raises an assumpsit on the part of an infant for the payment of necessaries furnished him. 3 *Bac. Abr.* tit. *Infancy & Age*, (I) 595. If an infant comes to a stranger, who instructs him in learning, and boards him, there is an *implied contract in law* that the party should be paid as much as his board and schooling are worth. *Ibid.* Before the act of 1785, (before cited,) it seems there were but two modes of remedy against a guardian, to compel him to account, *by bill in chancery*, or by *action of account*. 3 *Bac. Abr.* tit. *Guardian*, (I) 419. For although the act of 1729, *ch.* 24, *s.* 8, declares that guardians shall render an account to their wards of the surplus profits of their real estate, beyond what shall be necessarily expended in the maintenance and education of such wards, the remedy upon this act seems to have been by action of account. It does not appear that either the *commissary* or the *orphans court* had any power of citing a guardian to render an account, which, it seems, he was to do only when the orphan arrived at the age of *fourteen*, and he was compellable then by the orphan only by action of account. *Ibid.* The guardian, either as an accountant in chancery, or on an action of account, was entitled to all equitable allowances and reasonable expenses. *Ibid.* This is due to all *accountants* by the common law. *Co. Litt.* 89, a. Hence it may be argued, that although the *jurisdiction* over the accounts of guardians has been vested in a new court, such guardians are to account upon the same principles as in the former jurisdiction;

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and supposing a concurrent jurisdiction in the orphans courts, and courts of law, the same rule and principle must necessarily apply to, and govern the same subject. If, therefore, in a court of chancery, or in an action of account, the allowance contended for would have been made to the guardian, so both in the orphans courts, and on a trial at law, in an action upon the guardian's bond, it is equally due to the guardian. The expense of the maintenance and education of the orphan, for the time previous to the appointment of *Joseph Telford* to the guardianship, had created a claim against the infant, which must be considered both as legal and equitable. It was such as would have supported an action at law against the infant. *Telford*, then, being appointed guardian, and afterwards coming to account with the infant, whether in a court of chancery, or on an action of account in a court of law, would have been entitled according to the authorities cited, to such an equitable allowance. In like manner, when accounting with the orphans court, he might equally claim the allowance; for this act, which gave jurisdiction to a new court, to call a guardian to account, did not in any manner alter the *principles* upon which such account should be rendered or settled; and all equitable allowances were still due to him *as an accountant*, before whatever tribunal he might be called to render his account. This case may be considered as analagous to that of *an intruder*; the infant may dissemble the wrong, and call him to account as guardian. *3 Bac. Ab.* 419. So where any person who has protected and supported the orphan, and expended money in furnishing necessaries for his maintenance and education, shall afterwards be appointed his guardian, it is a confirmation by the orphans court of his expenditures and interference with the infant; and if without being appointed guardian, he might by law recover of the infant the value of the necessaries furnished him, much more is he entitled when claiming an allowance as a *guardian and accountant*. In short, it is impossible to conceive why his claiming the allowance, *when accounting as guardian*, should make such claim either the less equitable or legal. But it has been objected that this allowance could not be claimed before the jury, upon the evidence offered, because, as an account in bar, it could not be admitted, *no notice* having been given of such ac-

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count in bar, agreeably to the acts of assembly; nor had it been pleaded as a discount. But it is clear that the very question before the jury was upon the accounts passed by the guardian with the orphans court, and that they were referred to *by the plea of special performance*, stating that the guardian had accounted with the orphans court, according to law, and the accounts were required by law to be recorded. The account, containing the allowance in controversy, was a matter of record, to which the party was referred by the pleadings in the case, and to which he had access. No other notice than this was ever before required in such a case; and it can never be seriously contended that the law requires a guardian, sued on his bond, to give notice before trial, that he intends to rely upon his accounts, passed by the orphans court, and duly recorded. If this notice be requisite as to *any* items in such accounts, it certainly may be required as to all. The objection of a *want of notice* must therefore appear unfounded.

On the *third* bill of exceptions the question is, Whether the items in the account of a guardian, passed by the orphans court, which constitute the allowance or charge for board, clothing and schooling, ("*maintenance and education*,") for a period of time which had elapsed before the passage of such account, (the amount of which items exceed the yearly income of the orphan,) be a *final and conclusive ascertainment* of the amount to be allowed to the guardian for the maintenance and education of the orphan? Two points were made in the discussion of this question in the court below—*First*. That the ascertainment *by the orphans court* of the allowance for *maintenance and education*, was not conclusive; and *Secondly*. That the ascertainment should be made *previous to an expenditure*. The question of the conclusiveness of the ascertainment made by the orphans court, of the amount to be expended for *maintenance and education*, appears to rest on different and far stronger grounds for the appellee, than the *first* bill of exceptions. It has been before stated, that the act of 1785 vested a new and peculiar kind of jurisdiction in the orphans courts, by requiring that guardians should annually *settle* their accounts with those courts. By the operation of this act the orphans court was made a *party* to such settlement, and invested with a discretionary power of making allowances to the guardian, even beyond the *income*

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of the guardian. Such authority to *settle the account, ex vi termini*, implied the power of a conclusive adjustment of the *allowances* to be made, and to suppose an absolute discretion given to the orphans court to authorise such expenditure of the orphans estate, for his maintenance and education, as *they* might think most for his advantage; and that when such expenditure was actually incurred under the discretion of this court, and an allowance accordingly made for it, another tribunal might set it aside, appears to be the grossest absurdity. The authority given, and the power to be exercised in this case, are wholly different from a jurisdiction given to a court, to *administer the law* in cases of any particular class, wherein error in judgment of the law may take place, and ought to be redressed or corrected by appeal. A discretion to *ascertain sums of money to be expended*, must necessarily be supposed uncontrollable by any other tribunal than that in which such discretion is lodged, unless, indeed, some mode of correcting that discretion, *before the act authorised by it were actually done*, had been provided by law. It appears obviously to have been the intention of the legislature, by the act of 1798, *ch. 101, sub ch. 12, s. 10*, to vest an absolute and uncontrollable power in the orphans courts to superintend the education of the orphan, and to make, *in their discretion*, such allowance for his support as should, under all circumstances, be most advantageous to him, with a view to his future prospects in life. It was designed to do away that mean and contracted policy, which had before prevailed, of hoarding up the little property of the orphan, and suffering him to be brought up, without those advantages of education which might enable him to become useful to his country. Thus in the narrow policy of 1715, the act of assembly (*ch. 39, s. 9*.) directs that orphans shall be maintained and educated by the increase of their stocks, and interest of their estates, or *be bound out, &c.* But the impolicy and disadvantages of this system progressively appeared, and we find the legislature, in 1785, allowing an expenditure for the purpose of *maintenance and education*, of a part of the *principal* of the orphan's estate, not exceeding one-tenth. The act of 1798, with a liberal and enlightened view to ameliorate the condition of orphans of small estates, and to authorise the application of their little fortune for the attainment of the

greatest of all possible advantages, a good education, vests the orphans courts with a *discretion* to allow as much of the principal of the personal estate as would be sufficient to maintain and educate the orphan in a proper manner. That the ascertainment to be thus made by the orphans court was intended to be conclusive, is clear from the expressions of the act of 1798, (*sub ch. 12, s. 10*;) but more particularly from the *proviso* that no part of the *real* estate shall, on account of maintenance and education, be diminished, without the approbation of the court of chancery, or general court, as well as of the orphans court; for this shows, most clearly, that when the *real* estate was not concerned, the discretion of the orphans court, in making the allowance, should be uncontrolled. *Exceptio probat regulam.* Where the real estate was to be disposed of for the maintenance and education of the orphan, the discretion of the orphans court was to be checked by the superior discretion of the chancery court, or general court; but when only the principal of the *personal* estate was to be broken upon, the discretion of the orphans court might be exercised without control. The reasons which might have induced the legislature to give this absolute discretion to the orphans courts, are various and striking. In the first place, it seemed necessary that there should be some tribunal with which the guardian should account annually, to see that he was not going on for any length of time in making expenditures in his own wrong. By accounting *annually* he would ascertain what kind of allowance the court were disposed to make for the education and general advantage of the orphan, and his estate; and the tribunal making this allowance, on a settlement of the annual account, with a fresh impression of all the circumstances of the case, were better able to do justice than any court or jury at a distant future day, when many considerations, then justly weighing to induce the allowance, might be unattended to or forgotten. To allow the county courts, or a jury, to control the discretion given to the orphans court in this case, would amount to a *repeal* of the act of 1798, and unsettle numberless cases now supposed to be finally adjusted under the powers given by this act. A guardian has faithfully executed his trust; he may be supposed to have made large expenditures in the maintenance and education of the orphan, and to have fairly accounted with the orphans court,

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as directed by law; perhaps, out of abundant caution, he had obtained from the orphans court a *previous* ascertainment of the amount to be expended, and has squared his expenditures accordingly.—Is it possible that a construction of the law shall prevail that may subject him to a recovery by the ward of the amount of the very expenditure which he has made for the benefit of the orphan, and under the express direction of a competent tribunal? Such a construction might ruin many of the most faithful guardians, and operate as a gross fraud upon them. It may be here also repeated, that to suppose a *discretion* to be given to one tribunal to authorise a thing to be done, and that *when it is done* according to the direction of that tribunal, another shall rescind it, is too absurd a proposition to bear discussion. The courts surely will never give such construction to the acts of the legislature as must necessarily result both in absurdity and fraud. It has been objected that these accounts of guardians, passed by the orphans court, ought not to be admitted as conclusive evidence against the ward, because *he was not a party to the settlement of them*; and that it has been long settled, that a judgment or a record cannot be offered in evidence against a person *not a party to it*. Upon this principle, the accounts passed by the orphans court could not be evidence at all; but it has been expressly admitted that they are at least *prima facie* evidence. It might also be answered, that the law has made the orphans court *a party to the settlement*, they being the *paramount* guardians of all infants. But in truth, this principle, that a judgment or record is not evidence except between parties, has no application to the subject, from the peculiar nature of the *discretionary* act to be done by the orphans court, *in ascertaining the allowance to a guardian for the maintenance and education of the ward*. It is not a case of parties, as was said by the opposite counsel; for that reason it is contended, that the ascertainment made by the orphans court is conclusive. They are appointed the tribunal to superintend the affairs of infants, and are specially invested with a power of determining, with a view to the future prospects of a ward, how much of his estate shall be expended by his guardian in maintenance and education. When this expenditure is made by the guardian, under their sanction, from the very nature of the case there can be no appeal or

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redress, except as has been stated, that of fraudulently taking from the guardian the amount of expenditure actually incurred by him, under the express authority of the court. Two decisions of the last general court will be referred to and urged as authorities in this case<sup>(a)</sup>. The first of these cases, (*The State use of Sappington and wife, vs. Massey*,) turned upon the general question of the conclusiveness of the decision and judgments of the orphans courts. The contest arose upon the accounts of an administrator passed by the orphans court. And the distinction between this case, and that of the *special discretionary power*, to fix a sum of money to be expended for a particular purpose, must be obvious. On an executor's or administrator's account, allowances might be made, which are wholly unauthorized by law; and in such cases the party ought to have redress by appeal; but in any part, even of those accounts, where sums are to be ascertained and fixed, *in the discretion* of the court, and the law authorises the exercise of such discretion, it seems very absurd that an allowance so made shall be afterwards annulled. Consider any of the instances of discretion, which the orphans court are empowered to exercise, and the absurdity of the principle contended for will equally appear. In the case of a guardian, (for example,) the orphans court may allow him *to cut and sell wood*; when this shall be done under their authority, shall he be liable in damages as for a trespass? And may not a court of law, or a jury, before whom a contest may arise between a guardian and his ward, with equal propriety undertake to determine that the discretion in this instance was not *soundly exercised* by the orphans court, as in the case of their ascertaining what part of the personal estate ought to be expended for the benefit of the ward? But both the case of *The State use of Sappington and wife, vs. Massey*, and the other relied on (*Selby vs. Gunby*,) were decided by the general court without reference to the increased powers which it is well known the legislature intended to give to the orphans court by the act of 1798. They were cases of an administration and a guardianship account, respectively settled under the former laws, and did not come under the operation of the act of 1798. This court cannot therefore consider them-

(a) See them at the end of this case.

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selves bound by those decisions, more especially as they were not made in the *last resort*.

As to the *second* point on this exception, it could hardly have been *seriously* contended by the counsel, in the court below, that the allowance to a guardian must be always made and ascertained previous to the expenditure. The point is now understood to be given up. The constant practice of the orphans courts to allow, on a settlement for the past year, expenditures exceeding the income, must be conclusive on this point. The difficulty too of ascertaining *before hand* the amount necessary to be allowed, is a strong reason in favour of this practice; and the interest both of the orphan and guardian requires, that the construction which will authorise a confirmation of expenditures, *after they are made*, should prevail. Cases may be put where it would be utterly impossible to ascertain precisely or nearly what would be an adequate sum. But the language of the act of 1798 fully warrants the construction; after first declaring that the guardian shall annually settle an account with the orphans court, it proceeds, in another clause of the same sentence, to say, that the court shall ascertain, at discretion, the amount of the sum to be allowed on such settlement. But if the construction be not strictly *within the letter*, it is clearly within the spirit of the act; and must have been within the intention of the legislature. It is a rule that such construction ought to be put upon a statute as may best answer the intention of the makers, *qui hæret in litera, hæret in cortice*. Whenever the intention can be discovered, it ought to be followed, although such construction seem contrary to the letter of the statute. A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter. 6 *Bac. Ab. tit. Statute*, (I 5,) 384.

The opinion stated in the *fourth* bill of exceptions, is clearly inconsistent with that given in the third, viz. that the annual allowance made by the orphans court for the maintenance and education of the orphan, during the time of the guardianship, (the same allowance exceeding the income of the orphan,) was conclusive on the guardian, on a trial at law, and that he could not show by proof that such annual allowance was not reasonable, nor an adequate compensation to him. It had been before decided, (as stated

In the *third* bill of exceptions,) that this very same allowance was not conclusive, but only *prima facie* evidence, when the opposite party was offering evidence to set it aside; and afterwards, when the guardian, availing himself of this opinion, that it was only *prima facie* evidence, offered to show it inadequate, the court concluded him by the allowance. Why it should be held conclusive on one side, and not on the other, it is not possible at this time to be conceived. One solitary *attempt at a reason* was made by the counsel; *that the allowance was made on the application of the guardian*. It does not appear that the guardian applied for any precise sum; and if he had, it could not have made the case different, for the *discretion* of the orphans court might still allow a different sum to be expended, it surely was as competent to the guardian to prove that the allowance was unreasonably small, as to the orphan to prove it too large. The record shows, that the guardian had been allowed by the orphans court for time previous to his appointment, during which he had maintained the infant; and they had given an average allowance for the *whole* time. But if the court had allowed him to go into evidence of the actual expenses of the time, during which he was a guardian, he might have proved himself entitled to as much for those years as had been allowed for the whole time. It is considered that the inconsistency of declaring the *ascertainment*, made by the orphans court, conclusive on the guardian, and not on the ward, is too glaring to need further remark.

*Hammond*, for the Appellee. At the trial in the county court *four* bills of exceptions were taken by the defendant in that court, and upon these bills of exceptions, or some of them, the appeal is grounded. The *first* bill of exceptions states, that certain accounts had been rendered by the guardian to the orphans court, and had been passed and allowed; and that these accounts, (there being no real estate,) were offered as *conclusive evidence* of the propriety of the settlement, but were admitted by the county court only as *prima facie*, &c. To show the error, it is contended that the orphans court, having competent jurisdiction, exclusive or concurrent, over matters of this kind, its decisions are final and conclusive, and not re-examinable but in due course of appeal. To prove the jurisdiction

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of the orphans court, the act of 1798, *ch.* 101, was shown; and the 12th *sub ch.* and the 12th *sect.* of 15th *sub ch.* of the act were read; and the exception stated that the accounts in question belonged to this jurisdiction. To support the position that these settlements or decisions were conclusive, many cases have been cited from the *English* books; by which it appears, that the sentences of courts of record—of the ecclesiastical courts—of the admiralty courts—of courts martial and military courts, and the settlements of army accounts before commissioners, are all conclusive; and that the superior courts hold themselves bound by the judgments of the inferior courts. This court have all the cases cited. Therefore the county court was bound to admit the settlement of these accounts as conclusive evidence of their propriety. It is not proposed on the part of the appellee to question the authority or propriety of these cases; for supposing, as it is to be plainly inferred from every case, that proper *parties* were before the court, it is reasonable that they should be bound by the sentence or decision if they neglect to appeal. In the *English* courts of special jurisdiction, the proceedings are those in which formal and proper parties are made to them. They are cited or attached to appear, and opportunities are therefore given to maintain or defend the claims, and appeals are provided for those who consider themselves aggrieved. And this is the true principle of the position relied on. It amounts to this—the jurisdiction of such a subject is given to such a court—you have proceeded to make, or defend, the claim, and the court has decided, and both sides have been heard. If you were not satisfied, you should have made your appeal in the manner prescribed. In the present case the ward is *no party*, and ought not to be concluded. The guardian renders his accounts, and makes his statements and representations, without notice to the ward, or her next friend; and upon this *ex parte* hearing, the court proceeds to settle them. If such settlements should be conclusive upon the ward, they would have the singular effect of depriving *an infant* of those rights which are understood to be secured to all others—the *right to be heard*, before one is condemned—and the *right to appeal* from an unjust decision. 4 *Inst.* 340. But let the act of assembly, called the testamentary system, be fully examined, and the question before the court will be better understood.

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The *sub chapters* of that act, relating to this subject, are the 12th and 15th. Some sections of the 12th are those under which the guardians accounts were proposed to be settled. The chapter provides for the *appointment* of guardians, and prescribes their duties in the conduct and management of the estates of their wards. It supposes the proceedings to be altogether on the part of the guardian only; and the only cases in which it supposes the ward, or his *prochein amy*, to be present, are—Where the ward is brought before the court for the purpose of appointing a guardian—s. 2. Where a *prochein amy* applies to the court to call on a testamentary or natural guardian to give bond for the performance of his trust—s. 3. Or probably, on the application of such a friend to call on the guardian to give new security, and on failure, to appoint another guardian—s. 5. In all other cases, according to this chapter, the court may proceed to order and direct a guardian, and settle his accounts, without the presence of the ward or any of his friends, and consequently *ex parte*, and without the opportunity of appeal. It would therefore be unreasonable, and against common right, to consider such proceedings final and conclusive on the ward. Nor can it be understood from the chapter itself that such was the design of the legislature; because, 1. The general *superintending* power of the court of chancery, with respect to trusts, (not meaning here an *appellate* jurisdiction,) is expressly reserved in the last section of this very chapter. 2. The very terms of the guardian *bond* subject his conduct, and management of the orphan's property, to be tested, not only by the orders of the orphans court, but likewise *by the directions of law*; a provision which could be scarcely necessary if the guardian could defend himself simply by the orders of that court—s. 4. Under the first head, therefore, it is conceived, that the court of chancery, upon the orphan's bill, might examine and correct these accounts; and under the last, the bond appears to give the county court the like power. But it is apprehended that the 15th or last *sub chapter* of the act, which more fully assigns the jurisdiction of the orphans court, and regulates the manner of appeal, proves that no sentence, decision or order, was intended to be *final*, except such as the parties might make so by their acquiescence, and without prosecuting an appeal. But *without parties*, the idea of an *appeal* is nothing. Now in the 12th

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*sub chapter* one of the branches assigned to the jurisdiction of the court, and one therefore which might become the subject of appeal, is expressly the power to examine, hear and decree, upon all accounts, claims and demands, existing *between wards and their guardians*, and to enforce obedience to, and execution of their decrees, &c. This certainly supposes an application made to the court in behalf of the ward, and some litigation on the part of the guardian, or the necessity of his appearance. It therefore supposes a case with proper *parties*. This supposition is confirmed by the cases which follow as other subjects of their power, viz. accounts and claims between legatees and executors and between representatives and administrators; and also by the power to issue process for parties and witnesses, and compel their attendance, &c. And according to this construction, *Sophia Weaver* might by her next friend have applied to the orphans court, and prayed a re-examination of her guardian's account. She might have shown that the allowances were improper, and that her humble destination could never justify the least excess of her income, and upon a hearing of the parties, the court had power to correct and alter the accounts, though passed one, two, or three years before. If then the same court had power to *re-examine* and correct their own proceedings, (after the time limited for appeals in cases where parties are made and appeals do lie,) it proves that those proceedings are *not conclusive*, and may consequently be re-examined elsewhere. For if they were conclusive at all, they would be so upon the orphans court itself. But even in *English* cases there are certain limitations to the rule, which are submitted to this court, and may strengthen their inclination to reject as conclusive, what in reason ought not to be so. In *England* neither the judgment of a foreign court, nor a judgment obtained in any of their dominions, out of *England*, (except cases of admiralty jurisdiction,) is conclusive evidence of the debt or claim. It is only *prima facie* evidence, and the defendant is at liberty to show that nothing, or less, is due, or that the judgment was unduly or irregularly obtained. *Walker vs Hitter*, *Dougl.* 1, 2, &c. And yet the exemplification in these cases shows the appearance of *parties* and *regular proceedings*. In admiralty cases the foreign judgment is conclusive; and the reason given is, "If we do not admit their judgments, they

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will not admit ours." In addition to these remarks, it is contended that this question has received the decision of the judges of the late general court; first, in the case of *The State use of Sappington vs. Massey*, at April term 1798, and afterwards in the case of *Selby vs. Gimby*, at September term 1801. The first was the case of a legatee against the executor, upon the testamentary bond, and the question was, whether the settlement of the executor's accounts were conclusive? It was argued at great length, and many authorities were cited. The other case proposed the same question as to the accounts of guardians. In both the court decided, that such settlements were not conclusive, but only *prima facie* evidence.

The second bill of exceptions proposes two questions—Whether the orphans courts have power to make allowances for board, &c. for a time *previous* to the appointment of the guardian? And if not, whether a jury could lawfully make him this allowance in the present action? It is alleged, by the appellant, to be the *usage* of the orphans courts to make allowances to guardians in such cases. But surely they have no power *by law* to make such allowances, nor in any respect to go beyond the strict relation of *guardian* and *ward*; and a *late usage* could not avail, were any such stated or proved in the exception. But it is not on this ground that the appellant relies. He contends, that the jury had authority to make the allowance, and has cited 3 *Bac. Abr.* 595, (*new ed.*) and 3 *Bac. Abr.* 134, (*old ed.*) If an infant comes to a stranger, and receives board and learning, it raises an *assumpsit* to make him chargeable, if the infant be of the age of discretion. It does not appear in the bill of exceptions, at what time the ward was boarded, nor whether she was of the age of discretion. But suppose that under certain circumstances a stranger might sustain an action of this sort against the ward, after her arrival at age, does it follow that the defendant in the present action can claim the advantage of it by way of set off? In counter claims of this kind, the *account in bar* must be filed in due time, or it must be *pleaded* by way of discount, in order to give notice to the plaintiff. In this instance neither of these modes was pursued; so that the plaintiff could not be prepared to meet such a claim. It is further alleged, that in *England* actions of account, and bills in equity, between guardians and wards, are subject

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to every investigation, and the guardian is entitled to every reasonable allowance. *Co. Lit. s 9, a.* In actions of *account* the defendant is entitled to all reasonable allowances. This doctrine is certainly correct, and might favour the defendant's claim, if cases upon this subject could show that expenditures *previous* to the appointment were allowed. Such cases have not been shown; and therefore, as far as they depend upon principle, cannot establish what is contended for. An action of *account* cannot be maintained but where there is a *privity* either in law, (as between guardian and ward,) or by the provision of the parties, (as the appointment of a bailiff or receiver.) 1 *Bacon's Abr.* 18. The bill in equity is now substituted in place of the action of account, but doubtless the *privity* between the parties must be still preserved. It may therefore be fairly understood, that the investigation of the accounts can only relate to the period *during which* the *privity* subsisted. Besides, this is an action at law upon the bond, in which the guardian undertakes to account for and deliver the estate; and it is apprehended that he cannot upon the plea of payment, nor probably by any other plea, defeat or diminish the plaintiff's demand, by evidence of any fact arising *beyond the date* of his obligation. In the case of *Gunby vs Selby*, 2 *Harr. & Johns.* 244, where the question was, whether the ward, in a suit upon the guardian's bond, could entitle himself to rents and profits received by the guardian *prior* to the bond? The court decided he could not. The same principle applies here. If the ward cannot recover the profits so received, the guardian can claim no allowance for expenditures incurred before the execution of the bond.

The *third* bill of exceptions proposes the same question precisely as the first, whether the settlement of these accounts, by the orphans court, be *conclusive*, or only *prima facie*, evidence? But the appellant's counsel supposes, that because the orphans court have *express power* by the act, in certain circumstances, to make allowances to the guardian exceeding the income or interest of the estate, that therefore any exercise of this power is final and conclusive. But many other powers are as expressly assigned to them; and there can be no reason for saying that their proceedings are more conclusive in the exercise of one power than another. The same principles, therefore, which

may induce this court to affirm the opinion given in the first bill of exceptions, will induce it to affirm the opinion in the third.

The *fourth* bill of exceptions states, that *the defendant* offered to prove, that the allowances made to the guardian were insufficient, and that the jury had a right to exceed them; but the court were of opinion, that as the annual allowance *exceeded the income* of the estate, and had been ascertained by the orphans court, *the guardian was concluded* thereby, and that the jury could not exceed the said allowance. The appellant complains of this opinion, as being *inconsistent* with the opinion given in the other bills of exceptions; for he alleges, that if the settlement was open to examination; it was conclusive in no particular. But it will be observed, that though the ward was no party to this settlement; the *guardian was a party*. He rendered the accounts, advocated his own claims, and alleged or proved what he thought proper in support of them. They were passed with his knowledge, and he acquiesced with the settlement. It is therefore quite reasonable and proper that *he* should be *concluded* by it. Besides, the bill of exceptions states that *the annual allowance* made to the guardian *exceeded the income* of the estate. It was not therefore in the power of the county court, or of the jury, to exceed this allowance; because *the law* has declared that the estates of orphans shall be preserved to them, and that the income only shall be applied to their maintenance and education. In certain circumstances, indeed, the income may be exceeded; but of these circumstances the orphans court are the only judges, or those following them in a course of appeal. And with this view it is conceived, that the circumstances inducing this excess should be stated in the records of the orphans court, and that the order allowing it should *precede* the expenditure. The appellant's counsel, in his argument on the *third* bill of exceptions, contended that it was immaterial whether the allowance was made by way of *direction* to the guardian, or at the time of rendering his accounts *after* he had expended part of the principal. As to the question arising on the bill of exceptions, this consideration is not material; but as it was pressed by the counsel, and cases cited on the point, and as it is in this particular that the estates of orphans are so frequently injured, it may not be improper to invite the attention of this court

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to what appears in this chapter to be the design of the legislature. Its principal object appears to be the preservation of the estate *entire* to the ward; and that his support and education should be sustained out of the interest or *income*. This is apparent from the terms of the bond prescribed in the 4th sect. of the 12th sub chapter, and from the 6th, 7th, 8th, and almost all the following sections of that chapter. After providing for the *security* of the estates of orphans, the chapter then proposes the means of making them *productive* for the maintenance and education of the wards. The real estates, with the negroes and stock belonging to them, are to be valued, and so cultivated as to produce this value; wood and timber may be cut down and sold for this purpose; where the personal estate consists of specific articles, which are usually unproductive, they are to be sold, and the money put out to *interest*. If, notwithstanding these means, "the future situation, prospects and destination of the ward," should require a course of *education*, the expenses of which would exceed the income of his estate, then, but then only, a part of the principal may be applied; and it may be clearly understood from the 10th section, in regard to these circumstances, that they are to be first considered by the court, and that the guardian cannot expend beyond the income without the *previous direction of the court*. The language is of an expenditure *to be made*; and the court may even ascertain the *very sum to be annually expended*. And though a reliance was placed upon the 13th section, which seems to suppose the allowance made *at the time* of rendering the account, yet, to give it a construction consistent with the other provisions, it is necessary to consider the words, "unless allowed by the court," to mean, "unless allowed by the court," *as above mentioned*; and this construction is believed to be natural and correct. But the education and maintenance, the expense of which was to be allowed to exceed the income, were not those which were intended for orphans in general of small estates. Common schooling, where the ward boarded with the guardian, was quite out of the mind of the legislature. The education of male wards, at colleges or universities, whether at home or in foreign countries, and the study of professions, or the education of female wards at boarding schools, with the attendance of masters, in the *principal*

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accomplishments; and the considerable expenses incurred by these destinations, these are the education and maintenance to sustain which the income of the estates might be exceeded. It may be admitted, however, that cases may occur in common life where an orphans court might justifiably go a great way towards educating and bringing forward a promising and extraordinary ward. In the case of *Sophia Weaver*, there was no pretence whatever for exceeding her income; none is stated on the record, and none ought to be presumed. Supposing the excess to be proper, and to show that a *confirmation* of the expenditures was equivalent to a *previous* allowance, these cases were cited. 6 *Bacon, Ab. (new ed.)* 384. In the construction of statutes the view with which they were made ought to be considered, as well as the spirit and letter. *Lee vs. Brown*, 4 *Ves.* 369. What an executor has done properly, without application previously made, will be confirmed afterwards. An endeavour has been made to show what the view of the legislature was in these provisions; and in answer to the last case the court are referred to 2 *Bac. Ab.* 684, 685, where the following proposition in substance may be found: If a guardian applies *the profits*, (even the profits,) of his ward's estate, to the payment of incumbrances, (except such as bind the estate by judgment or mortgage,) without the previous direction of the court of chancery, the payment shall not be allowed.

*Bullitt*, on the same side. With respect to the first bill of exceptions, it is contended, on the part of the appellee, that the court below gave a correct decision, and that the judgment ought to be affirmed on that exception. The accounts of a guardian passed by the orphans court are not, and ought not to be conclusive evidence in a court of law of the correctness of the items contained in such accounts. The proceedings of the guardian in the orphans court are *ex parte*; his statements and allegations are submitted to the orphans court without examination or contradiction on the part of the minor, who is not present in court on such occasions, and if present, is incapable of acting for himself, and therefore the accounts ought to be open to examination and the correction of errors, if any, before another tribunal. It is a settled principle, founded in reason and justice, that no person shall be

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condemned without an hearing, and neither a verdict nor judgment can be evidence in any case, unless between parties or privies. 6 *Bac. Ab.* 476, 477, &c. *Esp. N. P.* 36, &c. It may be also observed, that the minor has not the chance of an appeal from the acts of the orphans court; for months and years elapse before he gains knowledge of the conduct of his guardian, and by law, an appeal from the acts of the orphans court must take place within a limited period, that is, on summary proceedings immediately or within three days, and on plenary proceedings within sixty days. See the Testamentary Law of 1798, *ch.* 101, *sub ch.* 15, *s.* 18. A court of chancery will not act against a minor without notice, and affording him an opportunity of being heard by his friend, and gives time indeed for investigation after the arrival of the minor at full age. The accounts are *prima facie* evidence, and justly, because they have the sanction of the orphans court, and are therefore to be presumed correct until the contrary shall be shown. It would be unreasonable, after the lapse of many years, to call upon the guardian to establish the several items in his accounts, and therefore, in the first instance, they are considered as correct, and the burthen of proof is on the minor to show that they are otherwise; this removes every idea of hardship on the guardian. The guardian is called on to settle his accounts with the orphans court, with the view that the interposition of that court may furnish some check on his proceedings, and with the further view that his accounts may supply him with *prima facie* evidence of his conduct, and also to supply the minor with grounds for an investigation. Two cases have been decided in the late general court, the one of *The State, use of Sappington, vs. Massey*, on the accounts of an administration sanctioned by the orphans court; the other, *Selby vs. Gunby*, on the accounts of a guardian sanctioned by the orphans court, wherein it was determined that such accounts furnished only *prima facie* evidence. These cases depended on the laws existing before the year 1798, which in principle, if not in terms, are the same as the present laws, and therefore those cases are considered in point. It is admitted, that the decisions of all courts, having jurisdiction over the subject matter, are conclusive on the parties and privies. But no case has been discovered wherein a person, neither party nor privy, has been concluded.

With respect to the *second* bill of exceptions, it is contended that the court below decided correctly, and that the judgment ought to be affirmed on that exception. The orphans court have no power by law to allow a guardian for expenses incurred in the maintenance of the minor, before his appointment. The court can only act on transactions between guardian and ward as such, and connected with that relation. The law directs, that the court shall ascertain the amount of the sum *to be* annually expended in the maintenance and education of the orphan. See Testamentary Law 1798, *ch.* 101, *sub ch.* 12, *s* 10. Things that happened between the guardian and minor, before the appointment, must be settled by them, and the guardian is not without a remedy to obtain justice, as a minor is answerable at law for necessities; but the account cannot be brought in bar to a suit on the guardian's bond for damages; as respects those previous transactions, the guardian and minor are strangers to the court, and cannot be noticed. The principle in chancery, that an act done without order, which upon application to the court would have been directed to be done, shall be sanctioned and allowed, in the same manner as if there had been a previous application and order, does not apply in the present case, because the orphans court could not have noticed at all an application from the guardian before his appointment, he being a mere stranger. It would be dangerous and inconvenient to permit the orphans court to go back beyond the appointment, as it might induce persons without authority or security to take possession of the estates of minors, and to continue such possession many years without account, who afterwards, and when it would be impossible to come at the truth of the case, might greatly impose on the court and minor by the passage of some general account.

With respect to the *third* bill of exceptions, it presents in principle, if not in terms, the same question, and that only which is to be found in the *first* bill of exceptions, and therefore, the remarks on the first exception are referred to as applicable to the *third* exception, with one or two additional objections. It is admitted that the orphans court may, by law, ascertain the sum to be expended by the guardian, and exceed the income, and although the law contemplates an ascertainment previous to the expenditure, it may be further admitted, that an allowance by the

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court of a sum expended after appointment and before ascertainment, shall have the same effect as a previous ascertainment. Yet it is contended, that the items of the account previously ascertained, or subsequently allowed, are open to examination, because the previous ascertainment, or subsequent allowance, may be made on the false *ex parte* representations of the guardian. The sum previously ascertained may not be fairly expended by the guardian, agreeably to the views of the court, so the sum subsequently allowed may not have been expended by the guardian, agreeably to his representations to the court. These facts may be inquired into in a court of law. If it be found that the guardian has acted honestly, and no imposition appears to have been practised on the court, no doubt the jury will adhere to the acts of the court, and perhaps they are bound so to do.

With respect to the *fourth* bill of exceptions. The interest or income of the estate of a minor is the first and general fund out of which he is to be maintained, and neither the guardian, orphans court nor jury, could exceed it previous to the law of 1785. See the acts of 1715, *ch.* 39, *sect.* 9, and 1729, *ch.* 24, *s.* 8. By the act of 1785, *ch.* 80, *s.* 9, the orphans court have a special power to exceed the income, which power is also given by the act of 1798, *ch.* 101, *sub ch.* 12, *s.* 10. The guardian cannot exceed the income without the sanction of the court. The power of the jury remains as it was prior to the act of 1785. Before the passage of the acts of 1785 and 1798, the jury had not a right to exceed the income or interest. These acts do not enlarge the powers of the jury in terms, but confine the extension to the orphans court, and therefore it is presumed that a jury at present cannot exceed the income. See Testamentary Law 1798, *ch.* 101, *sub ch.* 12, *s.* 13.

*Curia adv. vult.*

THE COURT at this term concurred with the county court in the opinions given in all the bills of exceptions.

JUDGMENT AFFIRMED.

The cases alluded to in the Arguments of the Counsel in the preceding case, are—

*The State use of Sappington, et ux. vs. Massey*, General Court, (E. S.) April term 1798. *Appeal from Kent county court.* It was an action of debt upon an administration bond. The general issue was pleaded, with liberty on the plaintiff to give in evi-

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dence the nonpayment of Mrs. *Seppington's* share of the personal estate of *George Browning*. The plaintiff, at the trial, having given in evidence the will of *Browning*, and that *Seppington* married *Mary Keeling*, one of the legatees of the residue of the personal estate of *Browning*, the defendant produced and gave in evidence his account as administrator *de bonis non* of *Browning's* estate, as the same stood stated in the orphans court of *Kent* county, under the seal of the register of that court. The plaintiff then moved the court to direct the jury, that the said account, under the seal of the register, was not conclusive evidence in this cause of the balance of the said estate, and offered to prove that the disbursement of £163, entered thereon to the credit of the defendant as a judgment recovered against him as administrator *de bonis non* of *Browning*, was not just or right, and that in fact there was no such judgment, but that the judgment was for a debt due to *G. Browning*, the younger, from *T. Browning*, deceased, for the payment whereof the defendant and *S. Bostick* were sureties, and that there was no debt due from *Browning*, the testator, to *G. Browning* the younger, who recovered the said judgment. To this the defendant objected, but the County Court, (*Tilghman* Ch. J.) overruled the objection, and gave this opinion to the jury: "That the paper exhibited under the seal of the orphans court of *Kent* county, is proper evidence to establish the disbursement as there stated, and that this court are concluded in the present cause, by the said account, from investigating and judging of the propriety of the said disbursements, the orphans court being competent, and having jurisdiction, in exclusion of this court, to settle and state the said account, and to allow or not allow the said disbursement as they might conceive right." The plaintiff excepted. And the verdict and judgment being against him, he appealed to the general court. That court reversed the judgment of the county court.

*Selby vs. Gunby*, General Court, (E. S.) September term 1801, on an appeal from *Worcester* County Court. It was an action of debt on a guardian's bond. At the trial the defendant, in support of his plea of performance, offered in evidence certain accounts passed by the orphans court, in favour of the guardian. The plaintiff was about to disprove certain charges in the guardian's account, as passed by the orphans court, and give evidence of the impropriety of the same, when the defendant objected, alleging that the accounts were conclusive evidence of the several charges contained in them. This objection was allowed by the county court, who refused to admit any evidence to controvert or disprove any of the items or articles contained in the accounts, and were of opinion, that the accounts, as passed by the orphans court, were conclusive and binding upon all parties, as to the matters charged or allowed in them, and that no averment or proof should be allowed against the items contained in them. The plaintiff excepted; and the verdict and judgment being in favour of the defendant, the plaintiff appealed to the general court. That court reversed the judgment of the county court.

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On a bill filed in chancery in the name of the obligee in a bond, which had been assigned to a third person, who was not made a party in the cause—*Held*, that the assignee of the bond should have been made a party.

APPEAL from a decree of the Court of Chancery, annulling certain deeds and declaring them fraudulent as to creditors. The bill of the complainant, (now appellee,) alleged, among other things not material to be stated, a debt due to him on bond, &c. from the ancestor of the defendants, (now appellants.) And it was proved by the testimony in the cause, that the bond was assigned by *W. Cooke*, the attorney of the complainant, to *T. H. Backer*, and by him assigned to *P. Macgill*; neither *Backer* nor *Macgill* were made parties. The chancellor having decreed in favour of the complainant, the defendants appealed to this court.

The cause was argued before *BUCHANAN*, *NICHOLSON*, and *EARLE*, J.

*Martin* and *Magruder*, for the Appellants, contended, that the proper parties were not before the court. That the complainant had no interest, having assigned away the bond to *Backer*, who assigned to *Macgill*. That *Macgill* should have been a party complainant. They referred to *Hind's Chan. Pr. 2*.

*Pinkney*, for the Appellee, admitted that proper parties had not been made.

DECREE REVERSED.

DECEMBER.

BONNER vs. BOYD.

In an action of slander the plaintiff proved that the defendant, amongst a crowd of people assembled, said, pointing at the plaintiff, *there is the man who stole my horse, and fetched him home yesterday morning—Held*, that the words were actionable.

APPEAL from *Baltimore County Court*. This was an action of slander, and the words charged in the declaration to have been spoken, were, that "he (meaning the plaintiff, now appellant,) had stolen my horse, and brought him home this morning." "His partner stole my pocket book; and there is the man, (pointing at and meaning thereby him the plaintiff,) who stole my horse and brought him home this morning." Also "that he, (meaning the plaintiff,) had stolen my horse, and brought him home this morning." The general issue was pleaded. On the trial the plaintiff proved that the defendant, (now appellee,) amongst a crowd of people, assembled at a public vendue, said, pointing at the plaintiff, "there is the man who stole my horse, and fetch-

ed him home yesterday morning." The defendant then moved the court to direct the jury, that the plaintiff was not entitled to recover. And the Court, [Nicholson Ch. J. and Jones, A. J.] gave the direction. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court, where the cause was argued before BUCHANAN, EARLE, and JOHNSON, J.

1811.

Dunnington  
vs  
Dunnington

*Winder*, for the Appellant, contended, that the words spoken were actionable; and that the offence alleged against the plaintiff brought him in danger of legal punishment.

*Boyd*, for the Appellee, cited 2 *Esp. Dig.* 497, 498. *Bull. N. P.* 5. And contended that the words spoken imported but a trespass, and not an act which could make the plaintiff liable to a criminal prosecution.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DUNNINGTON'S Ex'r. vs. DUNNINGTON'S Adm'r.

DECEMBER.

APPEAL from *Charles County Court*, from a judgment in favour of the defendant below, (now appellee,) in an action of replevin brought against him on the 30th of January 1804, for a negro boy named *Jesse*. The defendant pleaded property, *non cepit infra tres annos*, and *actio non accrevit infra tres annos*. To these pleas there were the general replications, and issues were joined. At the trial, the plaintiff proved by a competent witness, that the negro boy in dispute was the property of *William Dunnington*, senior, the plaintiff's testator, and was loaned by him to his son *William Dunnington*, junior. The plaintiff then gave in evidence, without objection, the will of *William Dunnington*, senior, dated the 8th of September 1794, reciting, that "as to what worldly estate it hath pleased Almighty God to bless me with, I dispose of in the following manner." Sundry devises and bequests are contained in this will, of lands and negroes, but the negro boy *Jesse* is not named therein. The devise to *William Dunnington*, junior, is of land, and also a negro lad called *John*; and the testator directed that the balance of his estate should be divided between his sons *Peter* and *Francis*. The lat-

In replevin by W's executor against E's administrator, for a negro boy, the defendant, for the purpose of proving a gift of the negro boy, by W to J, whose administratrix E was in her life-time, offered in evidence K, the wife of B, which K was the daughter and one of the representatives of J and of E, and to restore her competency, gave in evidence a receipt given by B to E, as the administratrix of J, for his wife's share of her deceased father J's estate.—*Held*, that K's testimony was inadmissible.

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*Dunnington*  
vs  
*Dunnington*

ter he appointed his executor. The defendant then offered to read in evidence the deposition of a certain *Kitty Bloxham*, taken under a commission. She was admitted to be the daughter, and one of the representatives of *William Dunnington*, junior, and of *Eleanor Dunnington* the defendant's intestate, and also to be married to a certain *James Bloxham*. Her deposition stated, that she was present at a conversation which took place between her grandfather and her father. Her father said to her grandfather, that he did not think he had used him well, that he had given to each of his other children a negro, and had never given him one; to which her grandfather replied, yes, *William*, I have; I gave you *Jesse*. Her father replied, I did not know you had given him to me. Her grandfather again replied, yes, *William*, I give him to you. This conversation happened 3 years and 4 or 5 months before the death of her grandfather. That *Jesse* was upwards of 3 years in her father's possession, before her grandfather died, and was in his possession at the time of the gift above stated. That from the time of the gift the boy was employed, kept and considered, as her father's slave. And the defendant then, to render the testimony in this deposition competent, produced the receipt of *James Bloxham*, the husband of the deponent, dated the 30th of July 1805, acknowledging to have received of *Eleanor Dunnington*, administratrix of *William Dunnington*, deceased, all and every part and parcel of his wife, *Catharine Bloxham's* proportion of her father's, the said *William Dunnington's* personal estate. The plaintiff, however, objected to the competency of the evidence. But the court, [*Key and Clarke, A. J.*] were of opinion that it was admissible, and allowed it to be read in evidence to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *BUCHANAN, EARLE, and JOHNSON, J.* by

*T Buchanan and Magruder*, for the Appellant; and by *C. Dorsey*, for the Appellee.

JUDGMENT REVERSED, AND PROCEEDENDO AWARDED.

## STEVENSON VS. RIDGELY.

1811.

DECEMBER.

Stevenson  
vs  
Ridgely

APPEAL from *Baltimore County Court*. The plaintiff in the court below, (now appellant,) brought an action of replevin against the defendant, (the appellee,) for 12 hogsheads of tobacco. The defendant pleaded property; and at the trial the plaintiff gave in evidence, that he was the inspector of a public tobacco warehouse established at *Fell's Point* in *Baltimore* county, and that while acting in that capacity twelve hogsheads of tobacco were deposited at that warehouse, for which, after being inspected, twelve several notes were issued by him to the persons who lodged the said tobacco, as appeared by the notes produced in court by the plaintiff. He further gave evidence, that the holders of the said notes presented them to him while he was inspector, and demanded a delivery of the tobacco mentioned in them; that he then delivered to said holders by mistake, other tobacco than that mentioned in the notes, and which were accepted by them in mistake, without any objection on their parts; that the tobacco so delivered was different from that they were entitled to receive; and upon the delivery of the said tobacco the said notes were delivered up to him as inspector; that he was afterwards, and some time before the institution of this suit, removed from his office of inspector, and the present defendant appointed to succeed him; that the said twelve hogsheads of tobacco, for which the said notes were issued, were advertised for sale by the defendant as inspector, under the act of assembly of 1802, *ch. 27*; and that no demand was made for the said tobacco by the plaintiff, until after the publications of the said advertisement. The defendant then prayed the court to direct the jury, that on these facts the plaintiff was not entitled to recover. And the court, [*Nicholson*, Ch. J.] did accordingly so direct the jury, being of opinion, that the surrender of the tobacco notes to the inspector, as such, for the purpose of having the tobacco delivered to the respective holders, transferred no property in the tobacco to the inspector, although other tobacco than that due on the notes was delivered to them, and that to sanction such practices would be to open a door to the most abominable frauds, which might be committed by inspectors upon the several counties in which they reside; that it was the duty of every public officer to

A former inspector of tobacco by mistake delivered to the holders of certain notes, other hogsheads of tobacco than those mentioned in such notes. The hogsheads corresponding with the notes were by that inspector delivered over to his successor, and on his (the successor's) advertising them for sale under the act of 1802, *ch. 27*, s. 4, they were demanded by the former inspector, and he brought an action of replevin for them—*Held*, that he was not entitled to recover.

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Carroll  
vs  
Cockey.

act correctly in the discharge of his functions, and if he acted incorrectly, even by mistake, he could not avail himself of his own negligence to his own benefit, and to the injury of a third party. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, EARLE and JOHNSON, J. by

*Martin and Winder*, for the Appellant; and by  
*T. B. Dorsey*, for the Appellee.

JUDGMENT AFFIRMED.

DECEMBER.

CARROLL VS. COCKEY'S Adm'rs.

In a deed of conveyance from A to B, for a part of a tract of land called C, described by courses and distances, there was a covenant by A with B, stating that "whereas there issue out of Jones's Falls two races or water courses, into that part of C remaining unsold, which races intersect the S 3 deg E 359 perch line," one of the courses of that part of C, conveyed by A to B, and it was agreed between the parties, and covenanted by A with B, "that B, his heirs and assigns, shall have the full and free use and entire benefit of the said two races or water courses, as soon as they intersect the said S 3 deg E 359 perch line, and that

APPEAL from *Baltimore County Court*. This was an action of covenant, brought by the appellant against the appellee. At the trial, the plaintiff read in evidence the deed mentioned in the declaration, dated the 18th of July 1788, between *John Cockey*, the defendant's intestate, of the one part, and the plaintiff, of the other part, whereby in consideration of the sum of £3000 current money, the said *Cockey* granted, &c. unto the plaintiff, his heirs and assigns, for ever, all that part of three tracts of land called *Cockey's Trust, Hellmore, & Cockey's Recovery*, situate in *Baltimore county*, which is contained within the metes and bounds, &c. following, to wit, beginning, &c. containing 500 $\frac{1}{2}$  acres of land more or less, &c. The deed contained the following covenants: "And whereas there issue out of *Jones's Falls* two races or water courses into that part of said tract of land called *Cockey's Trust*, still remaining unsold, which said races or water courses intersect the

neither A, nor his heirs, &c. will at any time hereafter alter, change or divert, the course of the said two races or courses of water, from their present sources, through their present channel, or injure the said waters in their said courses, but that the same shall flow freely and uninterruptedly through their present channels, unto they intersect the said S 3 deg E 359 perch line, except such part thereof as may be necessary to water the meadows of the said A in his lands; and that B shall have free access, with or without workmen, to the sources of the said races, to increase the streams of water, or to do any other matter or thing to them that he may find necessary for their improvement; and that A shall and will at all times hereafter keep the said races or water courses, proceeding from the southwestermost part of the tract called C, in good order and repair, through that tract, until it intersects the said S 3 deg. E 359 perch line"—Held, that upon a construction of the whole covenant taken together, the intention of the parties was, that A should permit the water to flow through certain channels over his land, as designated in the covenant for the benefit of B, and that if the water did, at the date of the covenant, flow through those channels or races, A was bound to keep them in such order and repair, as that the water might always after continue to flow as freely as at that time; but that if the water did not and could not come into and flow through the upper race or channel at the date of the covenant, then A was not bound to deepen or widen the race for the purpose of conducting the water to the land purchased by B.

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vs  
Cockey

above mentioned S  $3\frac{1}{2}^{\circ}$  E 359 perch line, one of which said races lays northwesterly about 30 perches from the end of the said S  $3\frac{1}{2}^{\circ}$  E 359 perch line, the other near the S-westermost part of said *Cockey's Trust*: And whereas it is agreed by and between the said parties to these presents, that the said *Carroll*, his heirs, &c. shall have the full benefit of the said two races or water courses, as soon as the same shall intersect the said S  $3\frac{1}{2}^{\circ}$  E 359 perch line, and that the said *Cockey*, his heirs, &c. shall not at any time hereafter alter, change or divert, the course of either of the said two races or courses of water, out of his land, by any other ways or channels than those now laid out through the said S  $3\frac{1}{2}^{\circ}$  E 359 perch line. And the said *Cockey* for himself, &c. doth hereby covenant, &c. to and with the said *Carroll*, his heirs, &c. that he the said *Carroll*, his heirs, &c. shall have the full and free use and entire benefit of the said two races or water courses, as soon as they intersect the said S  $3\frac{1}{2}^{\circ}$  E 359 perch line, and that neither he the said *Cockey*, his heirs, &c. will at any time hereafter alter, change or divert, the course of the said races or water courses, from their present sources through their present channel, or injure the said waters in their said courses; but that the same shall flow freely and uninterruptedly through their present channels, until they intersect the said S  $3\frac{1}{2}^{\circ}$  E 359 perch line, except such part thereof as may be necessary to water the meadows of the said *Cockey*, his heirs, &c. in the said three tracts of land; and the said *Carroll*, his heirs, &c. shall have free access, with or without workmen, to the sources of the said races, to increase the streams of water, or to do any other matter or thing to them that he the said *Carroll*, his heirs, &c. may find necessary for their improvement. And the said *Cockey*, for himself, &c. doth hereby further covenant, &c. to and with the said *Carroll*, his heirs, &c. and to and with every of them, by these presents, that he the said *Cockey*, his heirs and assigns, shall and will, at all times hereafter, keep the said races or water courses, proceeding from the southwestmost part of the said *Cockey's Trust*, in good order and repair through the said tract, until it intersects the said S  $3\frac{1}{2}^{\circ}$  E 359 perch line, and that he the said *Cockey* now is the true and lawful owner of the said part of the said three tracts of land," &c. The plaintiff also gave in evidence the plots and explanations returned

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in this cause, (the land having been surveyed under a warrant for that purpose,) and that the locations made by him on said plots were correct. He also gave in evidence, that from the time of making the said deed, to the present time, the water hath not flowed in any manner, nor at any time, along the said race or water course issuing out of *Jones's Falls* at the point B, as designated on the plots; and that the said *John Cockey* in his life-time, and before the bringing of this suit, was frequently requested, on the part of the plaintiff, to cause the said water to run along the said race, as designated on the plots, up to the S  $3\frac{1}{2}^{\circ}$  E 359 perches line in the said deed mentioned, but always refused or omitted so to do. The defendants then gave in evidence, that at the time of making the said deed, the water of *Jones's Falls* did not flow along the said race issuing out as aforesaid at B, nor along any part thereof, and that the said water could not so flow, as the said race was, at the time of making the said deed, and then prayed the opinion of the court, and their direction to the jury, that according to the true construction of the covenant in the said deed, *John Cockey* was bound to leave the races, mentioned in said covenant and declaration, in the situation they were at the time the covenant was made, and should keep them in repair in the situation they then were, or in which the plaintiff might afterwards place them; and that if the jury should be of opinion that said *Cockey* had done no act to obstruct, alter, change or divert, the course of the water in either of said races, since the making of the covenant, and that the water in the upper race could not and did not flow along said race to the divisional line, without any act done or permitted by said *Cockey* to prevent it, and that the said *Cockey* at all times allowed and permitted the plaintiff, with or without hands, to enter on his lands, and to widen, deepen or increase, the said streams, for their improvement, or to do any other matter or thing to them that the plaintiff might deem necessary, that then the plaintiff was not entitled to recover in this action. And the Court, [*Nicholson*, Ch. J.] was of opinion, and so directed the jury, that upon a construction of the whole covenant taken together, the intention of the parties was, that *Cockey* should permit the water to flow through certain channels over his land, as designated in the covenant, for the benefit of *Carroll*, and that if the water did, at

the date of the covenant, flow through those channels or races, *Cockey* was bound to keep them in such order and repair as that the water might always after continue to flow as freely as at that time; but that if the water did not and could not come into and flow through the upper race or channel, at the date of the covenant, then *Cockey* was not bound to deepen or widen the race for the purpose of conducting the water to the land purchased by *Carroll*. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *BUCHANAN, EARLE, and JOHNSON, J.* by

*Harper*, for the Appellant; and by  
*Winder*, for the Appellees.

JUDGMENT AFFIRMED.

BOYER VS. TURNER'S Adm'r.

JUNE (E. S.)

APPEAL from *Kent County Court*. This was an action of debt by the assignee against the assignor of a bill obligatory. The defendant, (the appellant,) pleaded *nil debet*.

1. At the trial the plaintiff, (the appellee,) offered in evidence a single bill executed by *Joseph Calder*, on the 12th of September 1803, whereby he promised to pay to *Samuel Boyer*, (the defendant,) his executors, &c. \$100. He then offered in evidence the oath and assignment endorsed on the said bill, in the following words, (having first proved the due execution of the assignment:) "*Maryland, Kent county*. On the 26th of December 1803, came *Samuel Boyer* before me the subscriber, one of the justices of the peace of the county and state aforesaid, and made oath on the Holy Evangelists of Almighty God, that he has not, nor no one for him, received any part, parcel, security or satisfaction, for the within obligation.

*James Welch*."

"I *Samuel Boyer* do hereby assign, transfer and set over, unto *Ebenezer Turner*, of the state of *Delaware*, all my right, title, claim, demand and interest of, in and to, the within obligation on *Joseph Calder*, for the sum of \$38 & 1½, principal and interest, it being for value of him

1812.

Boyer  
vs  
Turner

Where the affidavit on a bond made by the obligee was sufficient to warrant its assignment under the act of 1763, ch. 23, s. 10.

To enable the assignee of a bond to maintain an action against the assignor, he must prove that the obligor was unable to pay the debt, or that he could not be found in the place or county of his usual abode, or that some other thing or casualty happened whereby he was not able to recover his debt from the obligor, though he had used due diligence for that purpose.

What shall amount to due diligence, is a question of law for the court, upon the facts of the case.

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received. As witness my hand and seal this 26th day of December 1803.

*Samuel Boyer, (L. S.)*

Witness, *James Welch.*"

To this oath and assignment the defendant objected as insufficient and inadmissible evidence, on the part of the plaintiff, on the ground that they were not such an oath and assignment as the law required. But the court, [*Earle, Ch. J. Purnell, and Worrell A. J.*] were of opinion, that it was proper testimony, and permitted them to go to the jury. The defendant excepted.

2. The defendant then prayed the court to direct the jury, that they must be satisfied that due diligence was used by *Ebenezer Turner*, or *James Welch* his administrator, to recover the debt from the obligor in the within bill, or otherwise they must find a verdict for the defendant. But the court refused to give that direction to the jury, and gave them the following: "That the jury, to find for the plaintiff, must be satisfied that *Calder* was unable to pay, or if able to pay at any time after the assignment, that the debt was not lost by the negligence or default of the assignee or his administrator. That the non-institution of a suit against *Calder* on the bill, is a circumstance of a negligence or default that ought to weigh with the jury; but that the bringing of an action on the bill was not indispensably necessary to a recovery against the assignor; and that if any positive facts, evincing negligence or default in the assignee or his representative, exist in the cause, they ought to be established by testimony on the part of the defendant. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *CHASE, Ch. J. and POLK, BUCHANAN, NICHOLSON, and JOHNSON, J.* by

*Chambers*, for the Appellant; and by  
*Barroll*, for the Appellee.

*NICHOLSON, J.* delivered the opinion of the court. The court are of opinion, that the affidavit on the bill obligatory in this case is sufficient to warrant the assignment under the act of 1763, *ch. 23, s. 10.*

To enable the assignee to maintain an action against the assignor, it is incumbent upon the assignee to prove that

the obligor was unable to pay the debt, or that he could not be found in the place or county of his usual abode, or that some other thing or casualty did happen, whereby the assignee was not able to receive or recover his debt from the obligor, he, the assignee, having used due diligence therefor. What shall amount to due diligence is a question of law for the decision of the court, arising upon the facts of the case.

The court do therefore reverse the judgment, and order a *procedendo* to issue.

JUDGMENT REVERSED, &c.

STEWART'S LESSEE vs. EVANS.

JUNE (E. S.)

APPEAL from Somerset County Court. Ejectment for part of two tracts of land, one called *Dashiell's Lott*, and the other *Steven's Folly*. The case was admitted to be this: Col. John Stewart was actually seized, in fee simple, of the lands mentioned in the declaration, and also of other lands of equal value with those mentioned in the declaration; and being so seized thereof, on the 12th of June 1794, died intestate, leaving two children, to wit, Jane Gale, a daughter, and Alexander Stewart, a son, his heirs at law under the acts of descents of this state, to whom the said lands descended. That a division and partition of the said lands were made according to law, between Jane Gale and Alexander Stewart, and those lands mentioned in the declaration were allotted to Jane Gale, as her part of her father's real estate, to hold in fee simple and in severalty, and into which she entered and was actually seized thereof in fee simple, and in severalty; and being so seized, in November 1797, died intestate, and without issue, leaving the said Alexander Stewart, her only brother and heir at law, to whom from her the said lands, in the declaration mentioned, descended. Alexander Stewart, after the death of Jane Gale, entered into the lands so allotted to Jane, and as brother and heir at law of Jane, was actually seized thereof in fee simple; and being so seized, on the 22d of June 1810, died intestate, and without issue, or father, mother, brothers or sisters, or descendants from either, and leaving the following persons, his relations, living at the time of his death,

1812.

Stewart  
vs  
Evans

J S seized of lands, died intestate in 1794, leaving A, a son, and J, a daughter; between whom a division and partition were made according to law. In 1797 J died intestate, and without issue, leaving A, her brother, her heir at law. In 1810 A died intestate, and without issue, or father, mother, brothers or sisters, or descendants from either, but leaving S, the eldest son of W, deceased, who was the eldest brother of J S, and who was the eldest and only uncle of A, and which W died before A. Also other children, and grandchildren of W, and the children, grandchildren, and great grandchildren of sisters of J S. Held, that the lands which descended from J to her brother A, on his death intestate, and without issue, were embraced by the act of 1786, ch. 45. to direct descents, and were to descend under the provisions of that act.

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Stewart  
vs  
Evans

viz. *John Stewart*, the lessor of the plaintiff, who is the eldest son of *William Stewart*, deceased, who was the eldest brother of Col. *John Stewart*, and who was the eldest and only uncle of *Alexander Stewart*, and which *William Stewart* died before the said *Alexander*. *Alexander Stewart* also left other relations living at his death, viz. other children, and grandchildren of the said *William Stewart*, and children, grandchildren, and great grandchildren, of sisters of the aforesaid *John Stewart*.

The question submitted to the court on these facts was, whether or not *John Stewart*, the lessor of the plaintiff, being the oldest son of *William Stewart*, who was the oldest brother of Col. *John Stewart*, and oldest and only uncle of *Alexander Stewart*, was not entitled, as heir at common law, to the lands in question? Or, whether the said lands descended according to the act of assembly to direct descents? The county court gave judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, and JOHNSON, J.

*Martin, Bullitt and Whittington*, for the Appellant. The only question is, whether the land, into which *Alexander Stewart* entered on the death of his sister, *Jane Gale*, and which descended from her to him, was operated on by the act to direct descents, 1786, ch. 45; if it was not, then the lessor of the plaintiff, as the eldest son of *William Stewart*, who was the eldest brother of Col. *John Stewart*, is entitled to the whole of *Jane Gale's* part; but if it is operated upon by that act, then others must come in for a part. There would be no doubt, except for the act to direct descents, that the lessor of the plaintiff is entitled to the land. Doth that act bar him? The person last seized, and who died seized, is the stock from whom the representatives must claim, without regard to the manner he or she obtained it. *Hule's Hist. C. L.* 246. 2 *Bac. Ab.* 29. Suppose before the act to direct descents, lands descended from the nephew to an uncle, (living the father,) and then the uncle died, who would then inherit—the uncle's children or the father? *Co. Litt.* 11, 12, s. 4. You are precluded from showing how *Jane Gale* entered on the land. Suppose she purchased it, would that make any difference? *Doe vs. Whichelo*, 8 *T. R.* 211. *Goodtille vs.*

*Newman*, 3 *Wils.* 526. *Doe vs. Morgan*, 7 *T. R.* 99. *Doe vs. Keen*, *Ibid* 382. Would the partition between *Alexander Stewart* and *Jane Gale* alter the nature of the estate; or in other words, does it make them hold by purchase and not by descent? *Alexander Stewart* did not acquire the land, but from his sister. She was seized, and *seisina facit stirpem*. Did he claim the land through the father? The descent from brother to brother, or from sister to brother, is immediate, and not through the father. *Collingwood & Pace*, 1 *Ventr.* 423. Where a statute uses words known to the common law, you must resort to the common law for their meaning. 4 *Bac. Ab.* 647. The preamble of a statute cannot enlarge the enacting clause. 7 *Bac. Ab.* 551, 553.

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Stewart  
vs  
Collier

*W. B. Martin*, *J. Bayly*, *T. Bayly*, and *Wilson*, for the Appellee. The common law rules have nothing to do with this case, but it depends on the true construction of the act to direct descents, 1786, *ch.* 45. The land descended immediately from the sister, and mediately from the father. Although the descent was not from or through, yet it was on the part of the father. On the construction of statutes, the preamble may serve to explain doubtful expressions. 6 *Bac. Ab.* 381, 384. In the construction of the act to direct descents, that part which says, if the estate descended on the part of the father, it should go to him, means that he should be the stock from whom the other claims should be ascertained.

JUDGMENT AFFIRMED.

STEWART VS. COLLIER'S LESSEE.

JUNE (E. S.)

APPEAL from *Somerset County Court*. Ejectment for an undivided eighth part of a tract of land called *The Ferry Quarter*. The facts were these: Col. *John Stewart* died intestate in 1794, seized in fee simple, as well of the land above mentioned as of other lands, leaving two children, viz. *Alexander Stewart* and *Jane Gale*, to whom said lands descended, as his heirs at law, under the act of 1786, *ch.* 45. A division was made of the lands after the death of Col. *Stewart*, between *Alexander* and *Jane*, and the land

A S died in 1810, intestate, & without issue, seized of lands which descended to him on the part of his father, leaving no mother, brother or sister, or any descendants from either; but leaving the children and grandchildren, of an uncle and aunts, the brother and sisters of his father—Held, that the children of the deceased uncle and aunts took

*per capita*, and not *per stirpes*, to the exclusion of the grandchildren,

1812.

Stewart  
vs  
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above mentioned, with other lands, were allotted to *Alexander*, who died seized thereof in 1810, intestate, and without issue; mother, brother or sister, or any descendants from either. Col: *John Stewart* had one brother and three sisters, to wit, *William Stewart*, *Betty Wailes*, *Nancy Porter* and *Sarah M. Murray*. *William Stewart* died in 1808, leaving issue *John Stewart*, *William Stewart*, *Robert Stewart*, *Betsey Evans*, *Nancy Stewart* and *Matilda Stewart*, all of whom are now living. The said *William Stewart* had also two other daughters, viz. *Rebecca Dasheill* and *Sarah Jones*. *Rebecca Dasheill* died in 1800, leaving issue who are still living, and *Sarah Jones* died in 1794, leaving issue who are also now alive. *Betty Wailes* died in 1785, leaving two children, viz. *Helena Collier*, (the lessor of the plaintiff,) and *Joseph Wailes*. *Joseph Wailes* died in 1796, leaving issue, who are now alive. *Nancy Porter* died in 1775, leaving one child, *Rebecca Cathel*, who died in 1806, leaving issue now living. *Sarah M. Murray* died in 1764, leaving issue *Nancy Russell* and *Rebecca Denwood*. *Nancy Russell* died in 1800, and *Rebecca Denwood* in 1804, both leaving issue, now living. The question was, whether *Helena Collier* was entitled to one undivided eighth part of the lands of which *Alexander Stewart* died seized? The county court gave judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, and JOHNSON, J. by

*Martin, W. B. Martin, J. Bayly, and Whittington*, for the Appellant; and by

*Bullitt, T. Bayly, and Wilson*, for the Appellee.

The questions argued were—1. Whether under the act to direct descents, (1786, ch. 45,) the estate of *Alexander Stewart* must be divided into four parts, and each of those parts should descend to the representatives as if the uncles and aunts of *A. Stewart* were living? 2. Whether the words of that act will authorise the construction that the representatives must claim *per capita* or *per stirpes*? The counsel for the appellant referred to *Dig. Chan. Ca.* 121, 213, 270, 276. *Butler vs. Stratton*, 3 *Brown's Chan. Ca.* 367. *Walsh vs. Walsh*, *Prec. in Chan.* 54. *Davers vs. Dewes*, 3 *P. Wms.* 50. *Durand vs. Prestwood*, 1 *Atk.* 454. *Bowers vs. Littlewood*, 1 *P. Wms.* 595; and *Stanley vs. Stanley*, 1 *Atk.* 455.

JUDGMENT AFFIRMED.

PETERS VS. JOHNSON.

DEC. 1813.

Peters  
vs  
Johnson

APPEAL from *Baltimore County Court*. An action of debt was brought by the plaintiff below, (now appellant,) against the defendant, (now appellee,) upon a bond executed by the latter to the former on the 15th of April 1807, reciting that the parties had referred certain differences between them to two arbitrators, &c. and conditioned that the defendant abide by the award to be made by the arbitrators, the award to be delivered to each of the parties within 60 days from the date of the bond. The defendant pleaded, that no award was made and delivered by the arbitrators to the parties within 60 days, &c. The plaintiff replied, that by a writing endorsed and signed by the defendant on the bond, further time was given to the arbitrators until the 25th of June 1807, to make an award, and that the arbitrators did make an award, which was delivered to the parties before that day. This agreement and award were set forth by the plaintiff in his replication, and a nonperformance of the award averred, &c. The defendant demurred to the replication, and the county court ruled the demurrer good, and gave judgment for the defendant. From that judgment the plaintiff appealed to this court.

In an action on a bond to submit matters to arbitration, the defendant pleaded that no award was made and delivered by the arbitrators to the parties, within 60 days, according to the condition of the bond, to this the plaintiff replied, that by a writing endorsed on the bond, and signed by the defendant, further time was given to the arbitrators until, &c. to make an award, and that an award was made & delivered before that day. The replication, on demurrer by the defendant, ruled to be bad.

The cause was argued before BUCHANAN, EARLE, and JOHNSON, J.

*Winder*, for the Appellant, contended, that the action could be supported on the defendant's bond to the plaintiff, with the agreement endorsed thereon, extending the time within which the award was to be made. He referred to *Jenkins vs. Lace*, 8 T. R. 87, and *Evans vs. Thompson*, 5 East, 191.

*Harper*, for the Appellee. The action should have been brought on the agreement or on the award, but not on the bond. He cited *Little vs. Holland*, 3 T. R. 590. The agreement gave no authority to the arbitrators to make the award, as it was signed by the defendant alone, and was therefore not binding on the plaintiff.

JUDGMENT AFFIRMED.

DEC. 1812.

CARROLL'S LESSEE VS. MAYDWELL, *et al.*Carroll  
vs  
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APPEAL from *Baltimore County Court*. This was an action of ejectment, brought to recover a tract of land called *The Addition*, otherwise called *Haile's Addition*, otherwise called *Addition*. The defendants, (now appellees,) took defence on warrant, and plots were made. 1. The plaintiff at the trial, gave in evidence, the certificate and patent of *The Addition*, surveyed on the 10th of January 1701 for, and granted the 10th of October 1704 to *Nicholas Haile*; and also the will of *Nicholas Haile*, the patentee, dated the 27th of February 1729, containing, among others, the following devises: "*Item*. I will to my beloved wife *Frances Haile*, my now dwelling plantation called part of *Merryman's Lot*, and my new plantation called *Haile's Addition*, to her and for her use, without molestation, during her natural life; and after her decease to my son *Neale Haile*, and my daughter *Mary Haile*. *Item*. I will to my son *Neale Haile* my now dwelling plantation, which is called part of *Merryman's Lot*, to him and his heirs for ever; also I will that my son *Neale Haile*, to have part of that tract of land called *Haile's Addition*, adjoining to my now dwelling plantation, and to begin at a great stone standing by the great run of this tract, and to run with a straight line to a bounded black oak standing on the land called *Haile's Addition*, to my son *Neale Haile*, and his heirs lawfully begotten, for ever; but and if he die without issue lawfully begotten, then all this land to the next of kin. *Item*. I also will that my eldest daughter *Mary Haile*, shall have all the remainder part of that tract of land called *Haile's Addition*, to her and her heirs of her body lawfully begotten for ever; but and if she die without issue lawfully begotten, then that land to the next of kin." He also gave in evidence a deed tripartite, dated the 11th of April 1771, between *Neale Haile*, the devisee in the said will, on the one part, and *Joseph Ensor* of the other

NH by his will in 1729, devised as follows: "*Item* I will to my beloved wife, F. my now dwelling plantation called part of *M's Lot*, and my new plantation called *H's Addition*, to her and for her use without molestation, during her natural life; and after her decease to my son H, and my daughter M." *Item*, I will to my son H my now dwelling plantation which is called part of *M's Lot*, to him and his heirs for ever. Also I will that my son H to have part of that tract of land called *H's Addition*, adjoining to my now dwelling plantation, and to begin at, &c. to my son H and his heirs, lawfully begotten, for ever; but and if he die without issue lawfully begotten, then all this land to the next of kin." The remaining part of *H's Addition* he devised in tail to his daughter M. In 1771 a common recovery was suffered by H for docking the estate tail vested in him in *M's Lot* and *H's Addition* by the will of his father NH, and for limiting and assuring the same to the use of J E. F, the wife of N H, was alive and in possession of the lands devised to her for life at the time when the common recovery was suffered, and continued in possession until her death, which happened after the death of J E, and that J E, and those claiming under him, were also in possession of the lands during the life of F.—*Held*, that F, the wife of N H, took a life estate in the lands devised to her, and that H, the son, took an estate tail in remainder.—*Held* also, that the common recovery suffered by H was defective there being no legal surrender of the life estate; and that the facts and circumstances disclosed were not a sufficient foundation to presume that there had been a surrender of the life estate by the tenant for life.

*Held* also, that the deed of 1771 for lending uses for suffering the common recovery and vesting the estate in J E, did not pass to and vest in J E, a base fee simple in the lands, notwithstanding H being dead, and though there was no proof of entry into the lands, or action to claim thereof by his issue, or any person claiming under them.

*Held* also, that the deed of confirmation in 1729, by H to M, who was appointed by an act of assembly a trustee of L E, an heir, son of J E, and the deed in 1794, by M, to the lessor of the plaintiff, were operative in law to vest in the lessor of the plaintiff an estate in fee simple in the land.

*Quere*. Whether or not lands will pass by a parcel exchange?

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part, and *William Cooke* of the third part, being a deed leading uses for suffering a common recovery for "docking, destroying and extinguishing, all estates tail, and all reversions, remainders, thereupon expectant or depending, of and in 105 acres of land, lately the dwelling plantation of *Nicholas Haile*, deceased, being part of a tract or parcel of land called *Merryman's Lot*, lying in *Baltimore* county; also 30 acres of land lying in the same county, being part of a tract or parcel of land called *Haile's Addition*, adjoining to the said dwelling plantation of *Nicholas Haile*, and which were devised to the said *Neale Haile* by his father *Nicholas Haile*; and for limiting and assuring the same unto and to the use of the said *Joseph Ensor*, his heirs and assigns," &c. "The said recovery to ensure, and the recoverer to stand seized of the premises to the use of the said *Joseph Ensor*, his heirs and assigns, for ever." And also a common recovery suffered of the said lands, by *Neale Haile* to *Joseph Ensor*, in the provincial court at April term 1774, in pursuance of the above mentioned deed. He also gave in evidence, that the land called *Haile's Addition*, in the said will, deed, and common recovery mentioned, and the land called *The Addition* in the said patent mentioned, is the same land, and that it was and is commonly known by the name of *Haile's Addition*. And also gave in evidence the plots in this cause; and that the locations made thereon by him were true. He also gave in evidence a deed of indenture from *Joseph Ensor*, in the common recovery mentioned, to the lessor of the plaintiff, for the said lands, dated the 27th of June 1771. The defendants then gave in evidence, by consent, the deposition of *Benjamin Long*, taken in a former action relative to the lands claimed in this action. This deposition, (taken on the survey in the case of *Merryman* and others against *Maydwell*, and sworn to in open court on the 15th of November 1788,) states, that he the deponent, (aged 71 years,) bought a tract of land called *The Forrest*, of *W. Worthington*, of the quantity of 200 acres; that *William Carter* agreed with the deponent for half the said land, on condition that the said *Carter* paid to *Worthington* £10 sterling; before the land was made over to the deponent, *Carter* exchanged his part with *Neale Haile* for the land that said *Haile* then lived on, with his mother, which is the land in dispute. That then *Carter* moved from the place

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he then lived to the place that he had of *Neale Haile*, and *Neale Haile* moved to the place he had of *Carter*. That he understood from *Haile* that he gave *Carter* a bond of conveyance for the said land. That *Haile*, about 8 or 10 years after the exchange, told the deponent he did know whether he would make over the land to *Carter*, as he thought the land was worth more than the penalty of the bond. That *Carter*, a few months before his death, told the deponent he never gave *Haile* liberty to make over the said land to *Joseph Ensor*. That the deponent assisted to build the house shown to the sheriff and surveyor, which house *Carter* moved into and lived with *Neale Haile's* mother, until he built a house for himself; and that *Carter* lived at the said place in the hard winter, which the deponent thinks was about 1740, and that he never understood but that the said *Carter* was in quiet and peaceable possession, until his death. The defendant also gave in evidence, that *Frances Haile*, the wife of *Nicholas Haile*, the deviser and patentee, in the said will mentioned, was alive and in possession of the said lands, which are part of the same that were devised to her by the will of *Nicholas Haile*, during her life, at the time when the said common recovery was suffered, and long after. And that *William Carter*, owning two tracts of land in *Baltimore* county, called *The Forrest* or *The Forrest Resurveyed*, did in the fall of the year 1739, exchange and swap the said lands with *Neale Haile*, for those parts of *Merryman's Lot*, and *The Addition*, or *Haile's Addition*, which were devised to him by the will of *Nicholas Haile*, and that each of the said parties respectively delivered to the other the possession of the lands which they had thus exchanged, in the latter end of the fall of 1739, or the beginning of the year 1740. That *William Carter*, and his family, lived in the same house with *Frances Haile*, the devisee for life under the will of *Nicholas Haile*, during that winter, and in the spring he built himself a house on said land, and began to clear and cultivate the same, and continued in the undisturbed possession of the same from that time until about the year 1778, with the approbation and consent of *Frances Haile*, the tenant for life, when he removed away, and *Joseph Ensor*, under a contract of purchase from *Carter*, entered into possession of the place. That *Joseph Ensor*, if he ever paid any part of the consideration which he was to have paid

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to *Carter* for the said land, altogether failed to pay a considerable portion of it. That about the time of the death of *Joseph Ensor*, which happened sometime about the year 1779 or 1780, *Carter* returned and took possession of the said land again; and that *Carter*, and the defendants claiming under him, have been in the peaceable possession of the lands, for which this ejectment is brought, from that time till the institution of this suit. The plaintiff then further gave in evidence, the deposition of *George Chiles*, taken by consent, and admitted in evidence, and all and singular the matters therein contained, (subject to the same legal exceptions which might be made to it, if the facts were given in evidence by the deponent in person,) to prove that *Frances Haile* did surrender her life estate in the said lands to *Neale Haile*, at or before the time of suffering the said common recovery, and that *Joseph Ensor* entered into and held possession of the said land, under the said common recovery, by and with the assent of *Frances Haile*, and did pay to her a valuable consideration for the said surrender and assent; and that the said common recovery was suffered, and the said possession under it taken and sold, by and with the assent of *William Carter*, in the said deposition of *Benjamin Long* mentioned, under whom the defendants claim. This deposition of *George Chiles*, aged upwards of 74 years, was taken on the 4th of May 1807, and stated, "that he was well acquainted with a parcel of land called *The Addition*, or *Haile's Addition*, in *Baltimore* county, which was part of the dwelling plantation of *Nicholas Haile*, deceased, and was by him devised, as this deponent understood, to his son *Neale Haile*; and that he was also well acquainted with the said *Neale Haile*, and with *Frances Haile* the widow of the said *Nicholas Haile*, deceased, and with *Joseph Ensor*, late of *Baltimore* county, deceased, and *William Carter*, also of the said county, deceased, whose daughter he this deponent married. That he knew the tract of land in *Baltimore* county called *Merryman's Lot*, adjoining the tract called *The Addition*, or *Haile's Addition*; and that the dwelling plantation of *Nicholas Haile* was chiefly on the tract called *Merryman's Lot*, and included also a part of the tract called *The Addition*, or *Haile's Addition*; and that when he first became acquainted with the said lands, and the said *Frances Haile*, she lived in a house

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on *Merryman's Lot*, which was then said to have been the dwelling-house of her husband *Nicholas Haile*. That about 36 years ago he first became acquainted with *William Carter*, who then resided on the said dwelling plantation, and claimed it as his own under a purchase from *Neale Haile*; and he hath frequently heard *Carter* say that he had never obtained a conveyance from *Neale Haile*, some difference having arisen between them respecting a tract of land which he had given to *Neale Haile*, in payment or exchange for the said plantation. That about two years or a year and a half after, he so became acquainted with *Carter*, he married the daughter of *Carter*, and about two years after his marriage, went to live with the said *Joseph Ensor*, as his overseer. That after living with *Ensor* in this manner one year, *Ensor* purchased from *Carter* the aforesaid dwelling plantation, consisting of part of *Merryman's Lot*, and part of *The Addition*, or *Haile's Addition*; immediately after which *Carter* put *Ensor* into possession of said plantation, and removed away from it; that *Ensor* thereupon put this deponent on said plantation as his overseer, with two horses, one cow, and one slave, to cultivate it. That he does not know what sum *Ensor* agreed to pay for the said plantation, but perfectly recollects, that at the time of the purchase he paid and delivered to *Carter* a negro woman slave in part payment, but does not remember at what price. That about one year, or something less, after he went to live on said plantation as overseer, *Ensor* being desirous of obtaining a conveyance of the said land and plantation from *Neale Haile*, applied to *Carter* for his consent that such a conveyance should be made, to which *Carter* consented, observing that *Haile's* deed or conveyance would be as good as his own; on which *Ensor* answered, that it would be better. That this deponent was called as a witness to this conversation, which took place at *Ensor's* house. That *Ensor* at the same time informed *Carter* that *Haile* demanded from him £30 for making the said conveyance, which he thought very hard, as the land had already been sold to him; to which *Carter* replied, that he could not help it; and that he *Ensor* and *Haile* must settle that matter between them. That soon after this transaction, *Neale Haile* came to the house of *Ensor* for the purpose of going with him to *Annapolis* to make the above mentioned con-

veyance. That *Frances Haile*, who then resided on the said plantation, and in the house which had been her said husband's dwelling house, as this deponent always understood, and who was then, as this deponent understood and believes, upwards of 90 years old, went with them to *Baltimore-town*, on their way to *Annapolis*, for the purpose, as this deponent understood, of making over, before a magistrate, her right to the said land and plantation, so as to enable *Neale Haile*, her son, to convey it to *Ensor*. That this deponent did not go before the magistrate, but knows that *Neale Haile*, *Ensor* and *Frances*, did go together for the above purpose, as they said; and that this deponent's wife, who was the granddaughter of *Frances*, together with several other of her grandchildren, did accompany her. That they went, as this deponent understood, before *William Aisquith*, then a justice of the peace for *Baltimore county*, and now deceased. That this deponent saw them return, and understood from them that a paper had been signed by *Frances*, before the said magistrate, for the above mentioned purpose. That after their return *Frances* went back to her house; and *Ensor* and *Neale Haile*, with this deponent, and several other persons, then proceeded to *Annapolis* to have the conveyance completed, which however was not done at that time, which, as well as this deponent recollects, was in the fall of the year; and that in the spring following, they went again to *Annapolis* for the same purpose, when the said conveyance was executed, for which *Ensor* agreed to pay *Haile* £35, *Haile* having increased his demand from £30 to £35. That while *Carter* lived on the said plantation, after this deponent became acquainted with him, *Frances Haile* had a separate part of the land in her sole occupation, which she usually rented out; and that all the rest of the land was held and occupied by *Carter*. That when *Carter* sold to *Ensor*, and *Ensor* placed this deponent on the plantation, he took the whole of the land into his possession, and directed this deponent to pay her £5 per annum, to go to mill for her, to bring and cut her fire-wood, and to render her other services of this nature, as long as she should live, and choose to remain there. That in pursuance of these orders he did, for three years, pay her £5 per annum in necessaries, which he purchased for her use, and did perform for her the said services to the value, as he believes,

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of £10 per annum more. That she always received the said payments and supplies, of which this deponent kept an account, but never heard her say, nor mentioned to her particularly, what they were for; nor does he know that the said directions were given to him by *Ensor* in consequence of any agreement with her; and that at or about the end of the said three years, her house was burnt down, on which her son *George Haile* came and took her away; and after which the said payments, supplies and services, were discontinued, *Ensor* being then dead. That some time before the death of *Ensor*, and after they went to *Annapolis* the second time, when the conveyance was made by *Neale Haile* to *Ensor*, he heard *Carter* apply to *Ensor* for payment of the balance due to him for the said land, on which *Ensor* asked him how much was due, and he replied £70; and that *Ensor* then said, that he could not pay till the fall, but would then discharge the whole debt. That after *Ensor's* death he remained on the said plantation about three or four years, as a tenant, and paid rent to the guardian of *Ensor's* sons; and that at the end of this time, *Carter* came and took possession of the place, alleging that £70 of the purchase money was due to him from *Ensor*, or his heirs, and that he would keep the place till it was paid. That he does not recollect the year or precise time at which any of the above mentioned events took place, further than he hath stated above. And further, that when he, on going to live on the said plantation, as above stated, took possession of the whole of it for *Ensor*, including that part which had before been solely occupied by *Frances Haile*, she made no objection thereto, nor did she ever afterwards object thereto, but always received the above mentioned payments and services as her right." The defendant then prayed the court to direct the jury, that the plaintiff had not made title to the lands in question. And the Court, [*Nicholson*, Ch. J. and *Jones*, A. J.] did direct the jury, that the common recovery was defective, there being no legal surrender of the life estate, and of course that the plaintiff had not made title, and could not recover in this action. The plaintiff excepted.

2. The plaintiff then gave in evidence, that *Frances Haile* died while *Ensor*, and those claiming under him, were in possession of the said lands. And the defendants gave in evidence, that *Frances Haile* continued in posses-

sion of the said land until the time of her death, which happened after the death of *Ensor*. The plaintiff then prayed the opinion of the court, and their direction to the jury, that the deed of indenture tripartite, of the 11th of April 1771, passed to and vested in *Joseph Ensor* a base fee simple in the lands in the declaration mentioned; and that *Neale Haile* being now dead, and there being no proof of an entry into the said lands, or action to claim therefor by his issue, or any person claiming under them, the said base fee passed to the plaintiff's lessor by virtue of the said deed of indenture from *Ensor* to him, and will enable the plaintiff to maintain this action. This opinion the court refused to give. The plaintiff excepted.

3. The plaintiff then gave in evidence an indenture of and for the lands in the declaration mentioned, from *Neale Haile* the devisee in the will of *Nicholas Haile*, to *Elijah Merryman* and *David M'Meichen*, dated the 5th of September 1789, and also a deed of indenture of and for the said lands, from said *David M'Meichen* and *Elijah Merryman*, to the lessor of the plaintiff, dated the 1st of May 1794. The former of the said deeds recited, that *Neale Haile*, in the year 1771, did convey to *Joseph Ensor*, in fee simple, part of two tracts of land situate in *Baltimore* county, one called *Merryman's Lot*, and the other *Addition*, commonly called *Haile's Addition*. That the said *Merryman* and *M'Meichen* were appointed trustees of *Joseph Ensor*, an idiot, the son of the first named *Joseph Ensor*, by act of assembly, and the said lands were vested in them by the said act. That there were defects in the said deed from the said *Haile* to the said *Ensor*, and doubts whether the fee in the said lands was not still remaining in the said *Haile*; and for confirmation of the said title, and aid defects, and to bar the estate in tail, the said *Neale Haile* agreed to execute the said deed. He did, therefore, in consideration of the premises, and of five shillings, &c. grant, &c. the said lands, &c. unto the said *Merryman* and *M'Meichen*, in trust for the said *Joseph Ensor*, the idiot, and subject to a mortgage from the said *Joseph Ensor* to the lessor of the plaintiff. The defendant then gave in evidence an act of assembly, passed at April session 1783, ch. 13, appointing the said *Merryman* and *M'Meichen* trustees of the person and estate of *Joseph Ensor*, an idiot, the son and heir at law of the said *Joseph Ensor*,

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deceased. Whereupon the plaintiff prayed the direction of the court to the jury, that the said last mentioned deeds are good and operative in law to vest in the lessor of the plaintiff an estate in fee simple in the lands aforesaid. Which opinion and direction the court also refused to give. The plaintiff excepted; and the verdict and judgment being for the defendants, he appealed to this court.

The cause was argued at June term 1811, before CHASE; Ch. J. and BUCHANAN, EARLE, and JOHNSON, J.

*Key and Harper*, for the Appellant, contended, on the first bill of exceptions, 1. That *Frances Haile* had not a life estate under the will of *Nicholas Haile*, but that *Neale Haile* took an immediate estate tail in possession. 2. That the common recovery was valid, because the life estate of *Frances Haile*, if she took such an estate, ought, in point of law, to be presumed to have been surrendered by her to *Neale Haile*, or to *Carter*, and extinguished; or that it should have been left to the jury for them to presume, whether or not there had been such a surrender, from the facts and circumstances disclosed in evidence. Upon the doctrine of presumption, they referred to *Warren vs. Greenville*, 2 *Str.* 1129. *Goodtitle vs. Chandos*, 2 *Burr.* 1065. *Earl vs. Baxter*, 2 *W. Blk. Rep.* 1228. *Mayor of Hull vs. Horner*, *Cowp.* 104, 105. *Eldridge vs. Knott*, *Ibid* 214, 216. *Wilkinson vs. Payne*, 4 *T. R.* 469. *England vs. Slade*, *Ibid* 682. *Doe vs. Sybourn*, 7 *T. R.* 2, 3. *Campbell vs. Wilson*, 3 *East*, 297. *The King vs. The Inhabitants of Long Buckby*, 7 *East*, 45. *Daniel vs. North*, 11 *East*, 371, 374, (note). *Bull. N. P.* 110. 1 *Esp. Dig.* 254. 2 *Esp. Dig.* 173. *Beedle & Beard's case*, 12 *Coke*, 4, 5; and *Gittings's Lessee vs. Hall* 1 *Harr. & Johns* 18.

The second bill of exceptions was waived.

On the third bill of exceptions, they referred to the act of 1782, ch. 23, under which a common deed of bargain and sale may dock an estate tail, and cited *Laidler vs. Young's Lessee*, 2 *Harr. & Johns.* 69. *Jones et al. vs. Jones*, *ibid* 281. *Saunders vs. Simpson*, 2 *Harr. & Johns*, 32, (note).

*Martin and Winder*, for the Appellees, on the first bill of exceptions, contended, 1. That *Nicholas Haile* devised a life-estate to his wife *Frances Haile*, with remainder in

tail to his son *Neale*, (a.) 2. That presumptions have always been made to confirm and not to disturb possession. That in this case there was not the requisite possession to lay the foundation for presuming a surrender. That the court were correct in not directing the jury, or in leaving it to them, to presume the surrender, even if they thought there had been one. It was for the court to say whether the facts found amounted in law to a surrender. They referred to *Carroll, et al. Lessee, vs. Norwood*, 4 *Harr. & M'Hen.* 287; and 2 *Blk. Com.* 150, 158.

On the *third* bill of exceptions, they contended, 1. That the conveyance to *Merryman* and *M'Mechen* was to them as trustees of *Ensor*, the idiot, and that they were not authorised by the act of April 1783, *ch.* 13, appointing them trustees, to part with the estate, except in the mode pointed out by that act. 2. That *Neale Haile* contracted with *Carter* by way of exchange; and that a tenant in tail could part with his estate by exchange; and that *Carter*, by the exchange with *Neale Haile*, obtained a legal estate in the lands. To prove that an exchange might be by parol, they cited *Co. Litt.* s. 62. *Ferkins*, s. 244, s. 279, s. 285. *Co. Litt.* 50, b, s. 64, 66, 51. a. 10 *Vin. Ab.* 128, pl. 4, 129, 132, pl. 12, 134, 138, pl. 1, 4, 5. *Machil vs. Clerk*, 7 *Mod.* 25. *Jenkins*, 124, 249; and *The Stat. Frauds*, 29 *Car. II, ch.* 3, s. 1.

*Key* and *Harper*, in reply, as to exchange of lands by parol, referred to *Coke Litt.* s. 62. 2 *Blk. Com.* 294, 297; and 4 *Bac. Ab.* 494.

*Curia adv. vult.*

CHASE, Ch. J. at this term, delivered the opinion of the court, stating that the court concurred with the County Court as to the opinions in the *first* and *second* bills of exceptions, but dissented as to the opinion in the *third* bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

(a) CHASE, Ch. J. The Court are satisfied that Mrs. *Haile* took a life-estate in the whole lands devised to her, and that *Neale Haile*, the son, took an estate tail in remainder,

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PARTRIDGE VS. DORSEY'S LESSEE.

DECEMBER.

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An heir at issue in tail, claiming per formam donum, is not compellable to fulfil a contract entered into by the tenant in tail, for a sale of the entail-land.

The court of chancery has no authority to decree a specific execution of such a contract against the heir or issue in tail, the act of November 1773, c. 7, extending only to cases where the heir was bound to fulfil the contract of his ancestor.

Where the court of chancery did so decree on a false representation of the facts, and the question, whether the heir in tail was bound to convey the land in completion of the contract, was not before the chancellor, nor could arise in the case—Whether or not such decree, and the conveyance made pursuant thereto, do conclude the heir in tail, and operate to divest his right to the land? *Queere*

C D, by his will, devised to his son S, and his heirs in tail, certain lands, with the following restriction or proviso, "but in case my said son S is at this time married, or has disposed of himself in marriage to M S, or shall hereafter marry her, or dispose of himself in marriage to her, then I do hereby revoke, annul, and make absolutely void and of none effect, my said devise to my said son S as aforesaid, except 500 acres of land called." &c. "All which my said lands I do thenceforth, and in such case, give and devise to my son E, and the heirs of his body lawfully begotten; and for default of lawful issue, then to remain to my above named daughter, and their heirs, for ever." At the time C D made his will, his son S was married to M S, and after the death of C D, his son S petitioned the legislature to annul the restrictive clause in his father's will, he devised over, an infant of 14 years, and the daughters of the testator, with the husbands of those that were married, joining in the petition; and "it appearing to the leg. assembly that the marriage of S with M S, can be no disparagement," an act was passed declaring "that the said condition or restrictive clause shall be wholly void, and that the said will shall stand and be construed as if no such clause had been contained therein."—*Held*, by the county court, that the act of assembly was not void, but effectual and operative to annul the condition or restrictive clause subjoined to the devise to S in the will of C D.

The judges of the appellate court being divided in opinion, the judgment of the court below is affirmed.

The power and jurisdiction of the general assembly of Maryland in 1773, over all subjects of legislation within the limits of Maryland, were as great and transcendent as the power and jurisdiction of the parliament of England, within the scope of their authority. *Per Chase, Ch. J.*

ERROR to Anne-Arundel County Court. This was an action of ejectment for a tract of land called *Chew's Vineyard*, originally brought in the late general court, and on the abolition of that court transferred to the county court. The facts, as agreed upon, were these: *Caleb Dorsey*, being seized in fee of *Chew's Vineyard*, by his will, dated the 14th of March 1772, devised as follows: "As to my real estate, I give and devise unto my son *Samuel Dorsey*, and the heirs of his body lawfully begotten, my land called *Chew's Resolution Manor Resurveyed*, as also the land called *The Gore, Chew's Vineyard*, also one undivided moiety of my land in *Baltimore county*, called *Taylor's Forest*; and all that part," &c. "But in case my said son *Samuel Dorsey* is at this time married, or has disposed of himself in marriage to *Margaret or Peggy Sprigg*, or shall hereafter marry her, or dispose of himself in marriage to her, then I do hereby revoke, annul, and make absolutely void and of none effect, my said devise, legacy and bequest, to my said son *Samuel Dorsey* as aforesaid, except 500 acres of land lying in *Frederick county*, being part of *Caleb's Delight Enlarged*, all which my said lands and personal estate I do thenceforth and in such case give, devise and bequeath, unto my son *Edward Dorsey*, and the heirs of his body lawfully begotten, and for default of lawful issue, then to remain to my above named daughters, and their heirs, for ever." On the death of *Caleb Dorsey*, which happened shortly after the execution of his will, *Samuel Dorsey* entered into *Chew's Vineyard*, claiming the same under and by virtue of the said will, and became seized thereof as the law requires; and on the 2d day of May 1777, he entered into an agreement with

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*John Wells* to convey to him part of the said land, described by courses, &c. supposed to contain 350 acres, in consideration of the sum of £1000, to be paid when the said land should be conveyed, &c. if the part to be conveyed should contain more than 350 acres, then to be paid for in proportion, &c. *Samuel Dorsey* departed this life in the month of September 1777, intestate, and without having executed any deed to *John Wells* for the said parcel of land. At the time of his death, he left a son, *Edward Hill Dorsey*, the lessor of the plaintiff, who was a minor of the age of seven years, and who is the eldest son and heir at law of *Samuel Dorsey*. *John Wells*, on the 25th of January 1779, instituted a suit in the court of chancery against *Edward H. Dorsey*, the heir, and *Margaret Dorsey* the administratrix, of *Samuel Dorsey*, in which said suit the following proceedings were had: *The bill stated*, that *Samuel Dorsey*, deceased, became seized in fee, in his life time, of a tract of land called *Chew's Vineyard*, situate in *Anne Arundel* county, containing 950 acres, and on or about the 2d of May 1777, agreed to dispose of to the complainant 364 acres, part thereof, in consideration of £1040; and to perfect and ascertain the terms of the said contract, *Samuel Dorsey*, together with the complainant, made and executed the before mentioned agreement. That the complainant entered upon and took possession of the land, with the consent and in the presence of *Samuel Dorsey*, and had since cultivated, improved, and enclosed it. That the quantity is 364 acres, and the complainant became indebted therefor £1040. That he paid to *Dorsey*, in his life-time, £925. That *Dorsey* died in September 1777, seized in fee of the land, without having made any will, or without having executed any indenture, or other instrument of writing, to convey the said land to the complainant, as by the agreement *Dorsey* had obliged himself to do, and fully intended, (as he frequently told the complainant,) had he not been prevented by sudden death. That since *Dorsey's* death, letters of administration had been granted on his personal estate to *Margaret Dorsey*, his widow. That *Edward H. Dorsey*, an infant of tender years, to wit, of the age of seven years, or thereabouts, is heir at law to *Samuel Dorsey*, to whom the said parcel of land hath descended in fee simple. That the administratrix is well acquainted with the agreement, and of

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the payments made, and has frequently expressed her willingness and desire to comply with the terms of the said agreement, and to convey the land to the complainant; but that the complainant had been advised that the said conveyance would be inefficient, and of no validity, on account of the minority of the heir at law of *Samuel Dorsey*, unless made and executed under the particular direction, and by the decree of the court of chancery. That being remediless unless by the interposition of the said court, &c. to the end that *Margaret* and *Edward* might true answers make, &c. that *Edward*, by his guardian, might be compelled to make over and convey the said land to the complainant, his heirs and assigns, agreeably to the contract aforesaid, &c. prayed a writ of subpœna, &c. The proceedings state, that a subpœna issued, returnable to February term 1779, at which time *Edward H. Dorsey* appeared in proper person; and *Margaret Dorsey* was appointed his guardian to answer and defend the suit, who being present, accepted, &c. and at the same term she exhibited her answer, as well for herself as for the said infant, stating that they did severally admit that *Samuel Dorsey*, in the bill mentioned, was seized in his life time of and in the said tract or parcel of land called *Chew's Vineyard*, and that he made the agreement, &c. That *Wells* entered upon the possession of the land, &c. That the quantity is correctly stated, and they believed the payment as stated was made, but that the sum of £132 8 2, or thereabouts, with interest, &c. was still due, which sum they believed the complainant would pay. They further admitted, that *Samuel Dorsey* departed this life in September 1777, seized in fee of the land aforesaid, without having made any deed of conveyance of the said land in pursuance of his said agreement, but they believed he fully intended to comply with the terms thereof had he not been prevented by a sudden death. That since the death of *Dorsey*, letters of administration had been granted to the said *Margaret*, who was his widow; and that the other defendant, *Edward H. Dorsey*, is an infant of tender years, and heir at law of the said *Samuel*, to whom the said tract or parcel of land descended in fee upon the death of his said father *Samuel*. That she was well acquainted with the transaction between the complainant and the said *Samuel*, and she had frequently

expressed a willingness to have the same settled agreeably to the agreement, and was desirous that the land should be conveyed to the complainant without further expense or delay, as she was in want of the balance due on the purchase, &c. to satisfy demands against the estate of her husband; but they were advised, that any conveyance made by them would be ineffectual, by reason of the minority of the said *Edward*, unless made under sanction and by decree of that honourable court. Therefore the defendant, *Edward H. Dorsey*, being an infant of tender years, submits himself, by his guardian, to the judgment of the court, and humbly hoped that his rights might be protected and saved to him, &c. The following decree was passed by

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ROGERS, Chancellor. "It appearing, upon due examination, that the said several facts contained in the complainant's bill of complaint are true, and the said *Margaret Dorsey*, the mother and natural guardian of the said infant heir, having been appointed a guardian for him by the chancellor, to defend and answer the said bill, and to do all things appertaining thereto; and the said *Margaret Dorsey* having appeared to the said petition, and accepted the appointment of guardian to the said infant heir, and not showing any cause why the petition aforesaid should not be granted; and having signified to the chancellor that she does not know of any objection to granting the complainant the relief prayed for; and all parties concerned having been fully heard—It is ordered, adjudged and decreed, this 10th day of February 1779, on and with the assent of the said *Margaret Dorsey*, as guardian of the said *Edward H. Dorsey*, that the said *Margaret Dorsey*, as guardian of the said *Edward H. Dorsey*, do convey and assure to the said *John Wells*, his heirs and assigns, in fee, all that parcel of land, being part of a tract or parcel of land called *Chew's Vineyard*, lying and being in *Anne-Arundel* county, beginning," &c. "containing 364 acres, upon his the said *John Wells* paying to the said *Margaret Dorsey*, as administratrix of the said *Samuel Dorsey*, the principal sum of £132 8 2, current money, and also interest from, &c. saving and reserving liberty, according to the act of assembly in such case made and provided, to the said *Edward H. Dorsey*, to show cause, within six months after he shall have attained the full age of 21 years, and also for the

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heirs of the said *Edward H. Dorsey*, if he shall not so long live, in six months after his decease, if the said heirs shall then be of full age, and if the said heirs shall not then be of full age, in six months after such heirs shall have attained his, her, or their full age, why such conveyance as above decreed ought not to have been ordered or directed." In pursuance of this decree, *Margaret Dorsey*, the guardian of *Edward Hill Dorsey*, made and executed an indenture on the 27th of February 1779. *Edward Hill Dorsey*, at the time this suit was instituted, had attained the age of 24 years, and he had not at any time heretofore made application to the court of chancery to show cause why the said decree should not have been made, or such conveyance, so decreed, should not have been ordered or directed. The parcel of land, for which the present suit is brought, is the same land described in the will of *Caleb Dorsey*, and in the said decree and conveyance. At the time *Caleb Dorsey* executed his last will and testament, *Samuel Dorsey* was married, and had actually disposed of himself in marriage to *Margaret* or *Peggy Sprigg*, mentioned in the same will. In November 1773, the following act of assembly passed the legislature of *Maryland*, ch. 27. "An act for the relief of *Samuel Dorsey*, of *Anne-Arundel* county." The act, after reciting the will of *Caleb Dorsey*, and the restrictive clause upon his son *Samuel's* marrying Miss *Sprigg*, states—"And whereas the said *Samuel Dorsey*, by his humble petition to this general assembly, hath prayed an act may pass for annulling the said restrictive clause in his father's will, and *Edward Dorsey*, the devisee over, now an infant of the age of fourteen years, and upwards, *Charles Ridgely*, and *Rebecca* his wife, *William Buchanan Junior*, and *Peggy* his wife, *Michael Pue*, and *Mary* his wife, and *Eleanor Dorsey*, have joined in the same petition, and *William Goodwin*, and *Milcah* his wife, have not objected against such act; the said *Rebecca Ridgely*, *Peggy Buchanan*, *Mary Pue*, *Eleanor Dorsey*, and *Milcah Goodwin*, being the daughters of the said *Caleb Dorsey*, and devisees over in default of issue of the said *Edward Dorsey*; and it appearing that the marriage of the said *Samuel Dorsey*, with the person described in the said will by the name of *Peggy* or *Margaret Sprigg*, can be no disparagement, Be it therefore enacted," &c. "That the said condition, or restrictive clause, shall be wholly void,

and that the said will shall stand and be construed as if no such clause had been contained therein" (a). At the time of the passage of this act, *Edward Dorsey*, brother of *Samuel*, was a minor, about fourteen years of age. The lease, entry and ouster, as stated in the declaration in ejectment, were admitted. The question submitted to the court was, Whether or not the plaintiff was entitled to recover notwithstanding the decree of the court of chancery and the conveyance executed in pursuance thereof?

(a) In the Upper House, on the 20th of December 1773, on the passage of the bill, entitled, "An act for the relief of *Samuel Dorsey*, of *Anne Arundel* county," *Daniel Dulany*, esquire, with the leave of the house, desired that his protest might be entered, which follows, viz. **DISSENTIENT.**

1st. Because the owner of property having a legal right to give, has a legal right to dispose of it upon what terms, (consistent with the policy of the law,) he thinks proper, and therefore, whatever was the motive of the testator, *Caleb Dorsey*, in devising a considerable part of his estate to his son *Samuel*, upon the condition expressed in his will, a posterior law, professedly annulling the condition, which the testator was indubitably authorised by the prior general law to annex to the devise, will, by a retrospective operation, rescind an act incident to the right of ownership.

2dly. Because by the liberal devise to *Samuel Dorsey*, it appears, that the testator was very far from being destitute of the feeling of parental affection, and if he had not even made any provision for his son *Samuel* in his will, which I conceive would have been a case of greater compassion, than that which the petition represented, it would be a most extraordinary and unprecedented proceeding to enact a particular law for the very purpose of controlling the will of the owner of property, which under a prior general legal establishment he had an incontestable authority to dispose of, as he thought proper.

3dly. Because the motive of the testator, in annexing the condition in order to prevent his son's marrying the woman described in his will, is not known, and if known, (supposing the effect of a will ought to depend upon the propriety of the testator's motive,) might appear to have been proper. In this state of uncertainty, the possibility of a proper, just motive, (and such may be imagined,) affords, I conceive, a sufficient reason for not controlling the operation of the general established law, by which the owner of property is authorised to dispose of it by his last will, not being inconsistent with the policy of the law, in such manner as he thinks fit.

4thly. Because, as the motive for annexing the condition to the devise to *Samuel Dorsey* is not known, the principle of this act may be, I conceive, inferred to have been, that the will of a parent ought to be controlled by a particular subsequent legislative act, if the majority of the legislators, in their respective branches, suspect the motive of the testator to have been such, as they imagine would not have influenced their conduct in a similar situation, and that too supposed upon conjecture only; a principle which, I conceive, if maintained with consistency by future legislators, may be productive of great inconvenience.

5thly. Because the reasoning from the circumstance that the devisees in the will of *Caleb Dorsey* have joined in the petition for the act of assembly, is, I conceive, of little weight, inasmuch, as upon a breach of the condition annexed to the devise to *Samuel*

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The cause was argued in the General Court at May term 1798, before GOLDSBOROUGH, Ch. J. and CHASE, and DUVALL, J.

*Ridgely and Shaff*, for the Plaintiff. A court of chancery possesses no power, independent of legislative provision, to compel a *tenant in tail* to a specific performance of a contract made by the ancestor, for *entailed* land; and under the acts of November 1773, *ch. 7.* and October 1778, *ch. 22.* the court of chancery in this state has no such power. They referred to 1 *Fonbl.* 291. *Ross vs Ross*, 1 *Chan. Cas.* 171. *Norcliff vs. Worsley*, *Ibid* 236. *Fox vs. Crane & Wight*, 2 *Vern.* 306. *Weale vs. Lower*, 1 *Eq. Ca. Ab.* 266. 2 *Com. Dig.* 122, 127. *Sayle vs. Freeland*, 2 *Vent.* 350. *Davy's Case*, 1 *Ld Raym.* 531. *Coventry vs. Coventry*, 1 *Stra.* 602. *Firebrass's Case*, 2 *Sulk.* 550. *Powell vs. Powell, Finch*, 278. A tenant in tail, before the act of June 1773, *ch. 1.* authorising him to convey by deed of bargain and sale, could not alien at common law, except by common recovery and by fine. 1 *Fonbl.* 289, 290, 291. This was the law until the act of June 1773, *ch. 1.* which was similar to the act of November 1782, *ch. 23.* But no power is given by this act by which a decree in the case of a tenant in tail is made as good and available as in case of a tenant in fee. The decree in this case was obtained by suppressing the truth, and suggesting what was not true; and it cannot be contended that such a decree shall be an estoppel to all inquiry in this court, where the sole power of deciding the case is constitutionally vested. The decree is set up and offered in evidence as an effectual bar to the plaintiff's recovery; and it will be said, no doubt, that if the plaintiff prevails, this court will reverse a decree of the court of chancery, and exercise the powers of

*Dorsey*, the immediate limitation is to *Edward Dorsey*, who is an infant, of the real estate in tail, and of the personal estate absolutely; for the further limitation of the personal estate upon the death of *Edward Dorsey*, the infant, without heirs of his body, is *conceive, void*; and the other devisees, in respect of the limitation over to them of the real estate, upon the death of *Edward Dorsey* without issue, may transfer their interest to *Samuel*, without the aid of the legislature; and *Edward Dorsey*, when of age, would also have it in his power to relinquish the benefit of the condition in favour of *Samuel*. But the act of assembly, barring the limitation to *Edward*, deprives the infant of the provision which the general law hath established for the protection of infancy.

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an appellate court. It is not contemplated to call in question the decrees of the court of chancery, where its jurisdiction was competent, and rightfully exercised; but where a decree of that court is offered *in evidence* in this court, on a question where that court has notoriously no jurisdiction, and where the chancellor was evidently imposed on, or deceived by a misrepresentation of facts, surely this court will not say that such decree shall be conclusive on them. In all cases which the laws of our country have intrusted to the decision of the court of chancery, its decrees are *conclusive evidence*, as if, for instance, the lessor of the plaintiff had only an *estate in fee*, because the chancellor would then have exercised proper jurisdiction; will the court, by deciding that a tenant in tail is not barred of his remedy at law by a decree in chancery, where the chancellor hath no jurisdiction, and which decree was only intended to affect and bind him as a tenant in fee, reverse such decree? Or act as a court of appeals? No one who has seriously reflected on the case, and who is acquainted with the chancery jurisdiction, and their powers, can seriously advocate the affirmative of these questions. The powers of this court are the same as those of the King's Bench in *Great Britain*. It has a superintending power over all other inferior jurisdictions, either civil, ecclesiastical or military. The court of King's Bench has superintendency over all inferior jurisdictions, and are by law intrusted with the exposition of such laws and acts of parliament as prescribe the extent and boundaries of their jurisdiction. 4 *Bac. Ab.* 250. The King's Bench may prohibit any court whatsoever, if they exceed and transgress their jurisdiction. No court in *Westminster Hall* but may be prohibited by the court of King's Bench, if they exceed their jurisdiction. 18 *Vin. Ab.* 50. To prove that the chancery is one of those courts over which the court of King's Bench has jurisdiction, they cited *Davy's Case*, 1 *Id. Raym.* 531. 4 *Bac. Ab.* 252. To show how far decrees in chancery are evidence in courts of law, they referred to *Esp. Dig.* 758, 760, 761, 762. *Robins vs. Crutchley*, 2 *Wils.* 122, 127. *Bull. N. P.* 243, 244. *Burton vs. Fitzgerald*, 2 *Stra.* 1078. That the decree did not operate as an estoppel, they cited 3 *Com. Dig.* 269, 271, 272, 273. *Co. Litt.* 352, a. *Hayne vs. Maltby*, 3 *T. R.* 440. *Fairtitle vs. Gilbert*, 2 *T. R.* 171. *Esp. Dig.* 752, 753. 10 *Vin.*

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*Ab.* 421, 422, 480. *James vs. Landon, Cro. Eliz.* 35, 4 *Inst.* 84. 1 *Bac. Ab.* 559. If the truth can be disclosed, it appears that the court of chancery has given a decree for which that court had no authority—a decree for a conveyance by a guardian of a minor in tail. Before the act of October 1778, *ch.* 22, the chancellor had no power to decree a conveyance by guardian; and if such conveyance was made, it was inoperative. Before the act of 1785, *ch.* 72, a decree of the court of chancery only acted on the person, and not on the right, of course without the deed it did not divest the title. *Com. Dig.* 45, 106. 1 *Fonbl.* 29. The power to decree a deed from an infant, is only under this law, and the decree here cannot divest the title of the lessor of the plaintiff, it not being conformable to that law. The law says, where *the party had power to bind*, the chancellor may decree a deed. Here the party had no power to bind.

*Martin*, (Attorney General,) for the defendant. The case stated for the opinion of the court, has submitted two questions for their consideration—1. Whether as the court of chancery had decreed a specific execution of the contract made between *S. Dorsey* and *J. Wells*, against *E. H. Dorsey*, the infant heir, allowing him a certain time after he arrived of age, to show cause why the decree should not be valid, and he not having within that time availed himself of that provision, he can in an ejectment set aside the proceedings; or in other words, whether the general court can reverse a decree of the court of chancery, and declare null a title established by its decree, while it remains in full force unreversed?

2. Whether the legislature were competent to take away the actual vested rights and property of one private individual, and give them to another private individual, who antecedently had no legal or equitable title to or interest therein?

1. It is the peculiar province of the court of chancery to determine in what cases there should be specific executions of contracts; and although it should determine ever so often, that a contract made by him who holds land in tail should be specifically executed against the heir in tail, unless such decree has been set aside in the court of chancery, by a review, or reversed by the court of appeals, on

an appeal, it remains binding on the parties, and must be respected by every court of law. In this case, *E. H. Dorsey* neglected to avail himself of the provision in the decree, that is, within six months to show cause why the decree ought not to have been made, or ought to be set aside. He is now absolutely concluded thereby; or at all events, a court of law cannot set aside this decree of the court of chancery. In *Moses vs. Macferlan*, 2 Burr. 1009, Lord Mansfield declared, that "till a judgment is set aside, or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes." There the ground upon which the action proceeded would have been no defence in the court of conscience; but the allegation in this case, that the lands were entailed, would have been a defence in the court of chancery, provided that court could not specifically enforce those contracts, and the decree gave *E. H. Dorsey* six months after he arrived to full age to show that or any other fact which would set aside the decree. He referred to *Evan's Essays*, 63 to 70. *Peake's Evidence*, 50 to 52, (and notes.) *Meadows vs. Dutches of Kingston*, Ambler, 762. *Clews vs. Bathurst*, 2 Stra. 960. All which establishes incontestably, that the decree of the court of chancery cannot be questioned or set aside in this incidental manner. It is not to be inquired whether the chancellor was in possession of all the facts, or upon what grounds he decreed. A decree of his court, until reversed, is as binding as the judgment of any other court. Its jurisdiction is as unlimited as that of the general court; and in this case he was acting upon a subject completely within his jurisdiction. Since *Coke's* time no prohibitions have issued out of the court of King's Bench to chancery. In the case from *Raymond* no prohibition issued, and it does not appear that the prohibition would have issued. In *England* infants are bound, unless they show cause within a certain time after they come of age. It is only necessary to consider what the law was as established by the act of November 1773, ch. 7. While the decree and conveyance remained unrevoked, the title must be out of *Dorsey*. This court has no right to determine whether the court of chancery had jurisdiction. It is a subject of equity, not of common law jurisdiction. The act of assembly does not confine the chancellor to fee simple estates. When the subject is brought before the chancellor, who is to de-

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cide whether the estate was held in fee or tail, he may send it to the courts of common law, but he is not obliged. It appeared that the chancellor only had the power to determine whether a conveyance ought to be made. If the chancellor decided erroneously, a tribunal other than this must reverse his decree.

2. The act of assembly is an absolute nullity. A legislative body has no more right to do a judicial act, than a court of justice has to do a legislative act; each are equally improper, each equally void. No legislature has a right to interfere with, change, alter or take away, private property, except where the public interest demands it, nor then without making a compensation to the person from whom it is taken. 1 *Blk. Com.* 139. It would appear by the statement, that *C. Dorsey* annexed to his devise a proviso, which proviso the legislature, in the plenitude of their power, have annulled; and have declared, that though the testator's intent was to devise over the estate on a contingency, that such intention should not prevail; that the limitations over should be void. Such an act passed by a legislature body is not operative, it is an act of power, not of right. A law, not intended to influence the community in general, but to rob the next devisee, (who was an infant at the time the law passed, and incapable of giving his consent to it.) of so much property, must be a nullity.

*Shauff*, in reply, cited 2 *Com. Dig.* 122, to show, that if tenant in tail contracts for sale, receives the purchase money, and dies without fine or recovery, the agreement shall not be carried into execution against the issue in tail, or remainder-man claiming *per formam doni*, even though tenant in tail had been decreed to perform. It will not be denied, that unless issue in tail had land in fee from his ancestor, he is not bound by the contract of that ancestor. With respect to the act of assembly, it is expressly declared therein that the devisees over had assented.

*Curia adv. vult.*

Before the next term, *Goldsborough Ch. J.* died, and no decision was given. The case was depending in the general court when that court was abolished, and was therefore transferred to the county court of *Anne-Arundel*, by the act of 1805 *ch.* 65.

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At April term 1807, the cause was argued in that county court, before CHASE, Ch. J. and HARWOOD, A. J. by *Ridgely*, and *Johnson*, (Attorney General,) for the plaintiff below, and *Martin*, for the defendant. The arguments of the first and last gentlemen were similar to those used before the late general court.

*Johnson*, (Attorney General,) for the Plaintiff. The only question in this case is, Shall an heir in tail be barred by a deed executed by his guardian, grounded on a decree of the court of chancery, which decree is founded on an untrue allegation stated in the bill, and admitted by the guardian's answer, that the ancestor was seized in fee? If an heir so circumstanced can be barred, the plaintiff must fail; if the reverse, he must succeed. The authorities produced most conclusively prove, that if it had appeared in the bill in chancery that the defendant, (the now lessor of the plaintiff,) was seized in tail, and not in fee, the decree could never have been obtained, and the conveyance would never have been executed. Nothing is more clear, than that the issue in tail is not bound to carry into execution the contract of the ancestor. The estate tail, before the act of assembly, (*June 1773, ch. 1, and November 1782, ch. 23,*) could only be barred by fine and recovery; since the act of assembly it may be barred by deed. The defendant, if he claims under *John Wells*, and if he succeeds, avails himself of a decree which ought never to have been obtained, and which never could have existed if the *truth* had been disclosed. He protects himself under the *suggestio falsi* of the bill, and the *suppressio veri* of the answer. He protects himself by a compound fraud, practised against the lessor of the plaintiff, at a time when he was but seven years of age. It is contended, on two grounds, that the plaintiff is not precluded from recovery.

1. That the decree *exceeded the jurisdiction* of the court, and what was done there was *coram non judice*, and void.

2. That the decree was obtained by *fraud*, and therefore that, and the deed grounded upon it, are *void*.

1. The court of chancery possesses two kinds of jurisdiction—The one ordinary, agreeably to the common law, *secundum legem, et consuetudinem anglie*. The other extraordinary, according to the rule of equity, *secundum equum et bonum*. 4 *Inst.* 79. The ordinary power of

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the court appears coeval with the law; the extraordinary, in comparison, of recent date; no traces of the exercise of the latter jurisdiction is to be found before the reign of *Henry VI*, (which commenced in 1432;) since that period, to the present date, owing to the narrow contracted rules of the courts of common law, and various other causes, unnecessary to be detailed, its powers have been immensely increased by the decision of those who presided therein, and by various acts of the legislature in *England*, and this country. Near two hundred years after the extraordinary power of the court was recognized, its authority to control a judgment obtained at law, although evidently grounded on fraud, was contested. The opposition to the power of the court failed, and the authority has since been invariably exercised. The court of equity, (for I shall distinguish the extraordinary power of the court by that name,) is no court of record. It can bind but the person only, and neither the estate of the defendant in his lands, or his personal property. 4 *Inst.* 84. The late general court possessed the same controlling influence over inferior establishments and jurisdictions that the court of King's Bench exercised in *England*, "which keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below." 3 *Blk. Com.* 42. All the authority possessed by the general court is transferred to the court before whom this cause depends. If then the court of equity possessed no jurisdiction over the thing, but could only act against the person to compel him to do what the decree commanded, how can a deed, executed by the guardian of a minor, pass the legal estate of the minor, unless that estate was such as could be decreed to be conveyed consistent with the acts of assembly enlarging the jurisdiction of the court? All the jurisdiction possessed by the court to decree a specific performance against infants, to be carried into effect by the deed of the guardian, is founded on the acts of November session 1773, *ch.* 7, and October 1778, *ch.* 22. Before those acts, and at present in *England*, the decrees against infants are, that they shall convey when of age, unless within a given time cause is shown to the contrary. There the conveyance must be by a person having the legal estate. The act of 1773, *ch.* 7, is most evidently confined to fee simple estates; the

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language is, that persons under age, "seized or possessed of lands," &c. "or bound by an agreement to convey, made by some person or persons, having right or title to make such agreement, and therefore subject or liable to a decree for a conveyance, or a suit for a specific performance." If the position be correct that the heir in tail is not bound, by the agreement of the ancestor, to convey, and that the will of *Caleb Dorsey*, in the case stated, gives only an entail, then it clearly follows that the act of assembly has no effect on the case. This act changes the proceeding from what it is in *England*, and was before in this state. The decree is for the conveyance to be made during the minority. The time is given to vacate the deed, or rather to show cause why it ought not to have been made. Under the act of 1773, *ch. 7*, a practice must have prevailed of obtaining the deed from the guardian and not the minor. Those conveyances, although grounded on the decree, which had the supposed power vested by the act for its foundation, were supposed defective, to remedy which the act of 1778, *ch. 22*, passed. Under this law the deed is to be made by the guardian, and the former deeds are confirmed. Under this law, "the deed of the guardian of such person," &c. "shall be valid; that is, of such to whom lands had so descended are to be bound by the contract to convey; in other words, the heir in fee simple. If the act makes valid the deed of the guardian of such person, it leaves the deed of the guardian of other persons unaffected. As to them it is the same as if the law had never passed. But the act of 1778 proves another thing; that the conveyances made under decrees do not pass the legal estate, unless the decrees, and the conveyances in pursuance thereof, correspond with the law, under which they are made; where they depart from them even in form, nothing passes. From what has been said there could be no question, if the facts existing in the cause had been disclosed; that is, if the tenancy in tail had appeared, the decree could not have been made; but as the facts did not appear, and as the decree has taken place, can its effects be controled by this court? It is for the interest of society there should be an end of law suits; and therefore, where a judgment or decree is made by a court of competent jurisdiction, there the merits of that judgment or de-

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crec can never be inquired into by an original suit. If there is an appeal allowed from such decision, you must resort to it; if there is not, you are concluded by the decision in the first instance. The reverse of the principle is equally clear, that a judgment or decree of a court, not having competent jurisdiction, concludes nothing; it is of itself a nullity. Suppose, for instance, before the act of descents took effect, a man died seized in fee, leaving three children, A, B and C. The eldest, A, left the estate, and was supposed dead, intestate, leaving B his heir, who sold to D, gave a bond of conveyance, received the money, and died. A bill is filed for the conveyance, alleging B was seized in fee. The answer admits it, and the decree passes. Afterwards a will is discovered, by which the land, previous to the decree, was devised in fee to C, against whom the decree was had. Surely the decree, grounded on the supposed interest of B, and the corresponding obligation to convey, could not operate, when it turned out that B had no estate, and C claimed independent of him. The same applies to the tenant in tail, he claims *not through*, but *per formam doni*. The decree in this case doth not specify the effect of the conveyance, but in general decrees, and declares thereupon *the grantee shall have all the estate, which was in Samuel Dorsey, (for instance,) and which from him descended to, or devolved on, the defendant.* The act of assembly, it is true, declares the deed to have the same effect, as if executed by a person of full age; but yet it relates to deeds executed by minors in fee, who must have inherited from the ancestor. The jurisdiction of courts are circumscribed, 1. With respect to *place*. 2. With respect to *persons*. 3. With respect to the *subject matter of the jurisdiction*. We have clearly seen that the subject matter of the court of equity decreeing conveyances, is composed of fee simple estates; that they have no power or control over estates tail before or since the acts of assembly. But it may be contended, that as the court possesses the power to decree a conveyance, and having done so, it cannot be defeated by any thing *now* appearing, that the case was such as, if known, would have excluded the jurisdiction. The case of the *Marshalsea*, 10 Coke, 69, 76, proves that the officer who executes a precept, issuing on a judgment of a court of com-

petent jurisdiction, is liable as a trespasser. There a suit had been brought against one *Thomas Owingsted*, stating on the face of the declaration that he was within the jurisdiction of the court; he appeared—did not plead to the jurisdiction—a judgment is obtained against him; after an execution returned *non est*, process issued against his bail, who was taken, and for which the suit was brought; the *Marshalsea* to the action pleaded the judgment, &c. as a justification; the plaintiff replied, that neither himself, nor *Owingsted*, were within the jurisdiction of the court; the defendant demurred. In this case these principles are established—when a court has jurisdiction of the *cause*, and proceeds *inverso ordine*, or erroneously, there no action will lie against the party who sues, or the officer who executes the process; but where the court has *no jurisdiction*, the whole is *coram non iudice*, and actions will lie. The same principles are recognized in *Perkins vs. Proctor*, 2 *Wilson*, 382, where the defendant, the assignee of a bankrupt, who as such had obtained a judgment in ejectment, is made a trespasser, because the person declared to be a bankrupt was afterwards declared not to be liable to the bankrupt laws. It is said, in giving the opinion of the court, that “jurisdiction concerning bankrupts is confined to particular *persons* and *cases*, and the court of chancery acts herein, solely upon the application of the party petitioning, at whose peril the commission issues, and if he sues it out upon *false suggestion*, the law gives a remedy against him whose person or property is thereby invaded.” This case, as well as the former, distinguishes between irregular judgments, judgments reversed, and those given without jurisdiction—the first and last are void. In these cases nothing appeared in the original proceedings excluding the jurisdiction of the courts; the disclosure is made in the one by the pleadings, and in the other by the evidence in subsequent suits. The case at bar cannot be distinguished from them. It is true the defect of jurisdiction arose as to persons, but the same principles exist, and are recognized, where the *subject matter* is not within the jurisdiction of the court. If the court has no jurisdiction over the case, or the subject matter, its proceedings are void; the judgment stands for nothing. But how strong is the reason why they should be void, when he who claims the aid of them by a *false suggestion*, induced the belief

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of jurisdiction. "The law gives," in the language of the court in *Wilson*, "a remedy to him whose property is invaded." In *Moses vs. Macferlan*, 2 Burr. 1009, although the court got round an original judgment, yet before the decision in a subsequent case can be controled by a former judgment, it must appear to be the judgment of a court of competent jurisdiction. There the court would not be bound by the judgment of a court even of competent jurisdiction, because the *same question* did not arise. Here the question which was in the court of equity, and the one under consideration, are totally variant; there is no similitude between them. There has been a cause in the supreme court of the *United States*, which clearly establishes the authority of the court—that it is not controled by the decree—It is the case of *Clarke vs. Young*, 1 Cranch, 189, by which it appears that *Clarke* had bought from *Young, & Co.* a quantity of salt, and assigned to them a promissory note as a conditional payment. The drawer of the note proved insolvent, and a suit was brought against the endorser, *Clarke*. The plaintiffs failed. They then brought a suit for the salt, and the former judgment on the note was pleaded as a bar, that being the same cause. The plaintiffs obtained a judgment, which was affirmed in the supreme court. The chief justice, in giving the opinion of the supreme court, remarks—"it is perfectly clear, that in this case the *same question* was not tried in both causes." If this is to be the criterion, then I may declare, that this court is not concluded by the other, because it most evidently appears that the same question never was before both courts. But in the case before the supreme court, the shades of difference must have been slight indeed; for in the first case the plaintiffs ought to have succeeded, unless by delay or negligence in proceeding against the drawer, they made the debt their own; and if they did so, then the assignment of the note, with such conduct, amounted to a payment. But here nothing is more evident than that the questions are totally different. The decision of the supreme court of the *United States* defeated the effect of a judgment rendered by a court of competent jurisdiction. It confirmed the judgment of a court of coordinate jurisdiction with that which tried the first cause. The one, in effect, determined the assignment to be a payment, the other, that it was not; and that during the continuance of the first

judgment. The supreme court considered the *sameness* of the question the criterion whether a bar or not. Here we deny the jurisdiction, and here the questions are not the same.

2. The decree was obtained by fraud, and therefore the decree, and the deed grounded thereon, are void. The chancery, *cancellaria*, so termed a *canceliando*, from cancelling the King's letters patent, when granted contrary to law, which is the highest point of its jurisdiction. 4 *Inst.* 89. 3 *Blk. Com.* 47. The general court possessed the same power when the patents were obtained by fraud. If then, to make patents void is the *highest exercise* of authority, and this court *possesses* that power, it surely has the right of determining a deed to be void, which deed for its validity rests on a decree obtained by fraud. Fraud will invalidate in a court of law as well as in a court of equity. *Bright vs. Eynon*, 1 *Burr.* 390. *Fermor's case*, 3 *Coke*, 77. 2 *Morg. Ess.* 60. No case exists, or can exist, in which a court of law has ordered a patent to be cancelled. This power the court of equity alone possesses. But the court of law can do, and has done, what in effect is the same, adjudged, if it was obtained by fraud, nothing passes. In *Borcing vs. Singery*, 4 *Harr. & M'Hen.* 404, the general court determined, that if the jury were of opinion that the patent obtained by the defendant was fraudulently procured, that then nothing passed by it, and the junior grant to the plaintiff entitled him to the land—most explicitly, by this decision, recognizing the right of adjudging patents void, and freeing the parties from the necessity of resorting to the court of chancery. In *Bull vs. Sheredine*, 1 *Harr. & Johns.* 410, the general court also determined, if the deed executed by the sheriff of Harford county, under a *fieri facias*, was made through fraud, that it passed nothing. Surely then, if in the most transcendent cases the court has the power to adjudge the instruments void, they are not precluded in inferior instances, and more especially where the proceedings, so to be adjudged void, are not matters of record. It can scarcely be necessary to proceed to an argument, that the decree in question was obtained by fraud. A mere representation of the facts stamps the whole proceedings with the most conclusive marks of fraud. The chancellor is induced to believe *Samuel Dorsey* had an estate in fee. The complainant makes

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that allegation; the guardian admits it. The complainant obtains a deed for land, it was impossible for him to procure but by a false suggestion.—The guardian receives a sum of money, which could not have been received but by an untrue admission.—Both the badges of fraud, *suggestio falsi*, and *suppressio veri*, are used. In the examination of the subject the court will perceive the case is argued as if the defendant claimed under *John Wells*, and therefore must stand and is liable to the same judgment he would have received. But his claim does not appear in the case stated. He, from any thing in the cause, is a mere stranger. He cannot avail himself of the decree, and claim the benefit of that, and the deed by *Estoppel*. He is not a party or privy. Since the year 1766, lands must be conveyed in a certain peculiar manner; unless that is pursued nothing can pass. The acts of assembly since enacted, have in certain special cases authorised other persons than the legal holders to execute deeds for land, in which such persons had no interest. But it follows, as the *prohibition is general*, and the *permission special*, the land to be conveyed must be *specially* circumstanced as the *law* prescribes. We have seen that this land was not so circumstanced, and therefore we contend nothing passed.

CHASE, Ch. J. delivered the following opinion of the court. In considering this case, and the objection to the recovery of the plaintiff, the court have, as first in order of time, resorted to the will of *Caleb Dorsey*, under which the plaintiff derives his title to the land in question, to determine the quality of the estate acquired by *Samuel Dorsey*, the father of the lessor of the plaintiff, in the land, under the will, and are of opinion, that an estate in tail was devised to *Samuel Dorsey*, and that the lessor of the plaintiff, as heir or issue in tail, was not compellable to fulfil or execute the contract for the sale of the land made by his father to *John Wells*.

The court are also of opinion, that the court of chancery had no authority or jurisdiction to decree a specific execution of the contract against the lessor of the plaintiff, as heir or issue in tail of his father *Samuel Dorsey*. The act of assembly for the amendment of the law, which passed in 1773, (November session,) extending only to cases in which the heir was bound to fulfil the contract of his an-

cestor; and the heir in tail claiming the land *per formam doni*, and not deriving title under his father, is not bound to convey the land in fulfilment of the contract of his father.

It is objected that the decree of the court of chancery, set forth in this case, and the conveyance made pursuant thereto, will conclude the plaintiff, and prevent his recovery.

The bill in chancery filed by *John Wells* against *Margaret Dorsey and Edward Hill Dorsey*, makes a false suggestion in stating that *Samuel Dorsey* was seized in fee of the land in question; and *Margaret Dorsey*, by admitting in her answer the said statement, suppressed the truth. It is not material whether the suggestion and admission were made for want of due consideration of the will of *Caleb Dorsey*, or for the purpose of giving the chancellor jurisdiction in a case, which was not properly cognizable by the court of chancery. The decree is founded on the bill and answer. The question, whether *Samuel Dorsey* took a fee simple or fee tail under and in virtue of the will of *Caleb Dorsey*, was not decided by the chancellor. The will of *Caleb Dorsey* was not even referred to, or brought into the view of the chancellor, by the proceedings. The question, whether the heir in tail was bound to convey the land in completion of the contract of his father, was never considered or decided by the chancellor. The said questions never having been directly decided by the chancellor, the same not having been the subjects of his consideration, nor could arise on the said case, the court are of opinion, that the plaintiff is not concluded by the decree, nor can the decree, and conveyance made pursuant thereto, operate to divest the right and interest of the lessor of the plaintiff in the land, as heir in tail, under the will of *Caleb Dorsey*.

To prevent the recovery of the plaintiff in this case, it is also objected, that the act for the relief of *Samuel Dorsey* is an absolute nullity.

The above act of assembly makes void the condition or restrictive clause annexed to the devise to *Samuel Dorsey*, contained in the will of *Caleb Dorsey*, and is founded on the petition of *Samuel Dorsey*, and the assent of *Edward Dorsey*, the next devisee over, who was of the age of fourteen years, and on the assent of all the persons then interested under the will of *Caleb Dorsey*, except *William*

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*Goodwin*, and *Milcah* his wife, who did not object to the passage of the said act.

It is not stated in the case that *Edward Dorsey*, after he attained the age of twenty one years, ever withdrew his consent to the said act, or in any manner objected thereto.

It is stated in the act of assembly, that the marriage of *Samuel Dorsey*, with the person described in the will of *Caleb Dorsey*, was no disparagement to *Samuel Dorsey*.

At the time the act of assembly passed, the power and jurisdiction of the general assembly of *Maryland*, over all subjects of legislation within the limits of *Maryland*, were as great and transcendant, as the power and jurisdiction of the parliament of *England*, within the scope of their authority. And *Sir Edward Coke* informs us, "the power and jurisdiction of parliament is so transcendant and absolute, that it cannot be confined, either for *causes* or *persons*, within any bounds." This passage is cited and approved by *Sir William Blackstone*, who adds—"the parliament hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding, of laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal." He also declares, that "all mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal."

The general assembly were satisfied that the facts and circumstances disclosed in the act as the foundation of it, were sufficient to warrant the interposition of their transcendant and extraordinary jurisdiction; and the acquiescence of *Edward Dorsey*, and all persons concerned or interested under the will of *Caleb Dorsey*, since the passage of the act, exempt the motives of the general assembly from censure or reprehension.

The court are of opinion, that the act of assembly is not void, but effectual and operative to annul the condition or restrictive clause subjoined to the devise to *Samuel Dorsey* in the will of *Caleb Dorsey*, and do order that judgment be entered for the plaintiff for possession and costs of suit.

To reverse that judgment the defendant brought the present writ of error.

The cause was argued in this court in December 1810, before POLK, BUCHANAN, NICHOLSON, and EARLE, J. by

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*Martin, W. Dorsey, T. Buchanan, and Harper,* for the Plaintiff in error; and by

*Ridgely, and Johnson* (Attorney General,) for the Defendant in error.

The arguments of the Counsel were nearly the same as those before stated. It was contended, on the part of the plaintiff in error, by

*T. Buchanan.* 1. That the court of chancery had original and exclusive jurisdiction to compel the specific execution of contracts against persons of full age, and that by positive statutory provisions the same power was given against infants, under certain modifications. He referred to the acts of November 1773, *ch. 7, s. 11*, and October 1778, *ch. 22*.

2. That being a court of competent jurisdiction its decrees were conclusive on the subject matter of them, on all other jurisdictions, and could not be collaterally revised or annulled by them. He cited *Evans's Ess. 62, Marriott vs. Hampton, 7 T. R. 265. Philips vs. Hunter, 2 H. Blk. Rep. 402. Hitchen vs. Campbell, 2 W. Blk. Rep. 327; and Peake's Evid. 46 to 52.*

3. That there was nothing in the facts disclosed which could invalidate the decree, and consequent conveyance of the land. That if there was, it must be on the ground of *fraud*. That nothing short of fraud could vitiate the proceedings. But that *fraud* could not be *inferred or presumed* by the court on a case stated, or special verdict, it must be expressly found. He referred to *Chancellor of Oxford's case, 10 Coke, 56. Riddler vs. Punter, Cro. Eliz. 292; and Crisp vs. Pratt, Cro. Car. 550.*

*Curia adv. vult.*

NICHOLSON, J. at this term delivered the opinion of the court, *affirming* the judgment of the county court, in which EARLE, J. concurred.

BUCHANAN, J. dissented; and it was said by the court that POLK, J. (since dead,) had also dissented.

JUDGMENT AFFIRMED.

DEC. 1813. CARRERE vs. THE UNION INSURANCE COMPANY of Md.

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The warranty in a policy of insurance that the property is the insureds, is falsified by his having concealed papers on board of the vessel at the time of her capture—having practised artifice to prevent their detection, and by the use of fictitious names for the purpose of such protection.

If there has not been a total loss, can the insured recover for a partial loss, without having abandoned?

APPEAL from *Baltimore County Court*. Covenant on a policy of insurance. The defendants, (now appellees,) pleaded *non infregit conventionem*, and issue was joined. The plaintiff, (the appellant,) at the trial, read in evidence a policy of insurance, executed to him by the defendants, under their common seal, on the 5th of June 1806, in the usual form, from *Baltimore* to *Bourdeaux*, upon all kinds of lawful goods and merchandize, laden or to be laden, on board the schooner *Venus*, at the rate of 4 pr. ct. to the amount of \$20,000, warranted to be *American* property, proof of which, in case of need, to be required in the *United States* only. He also gave in evidence, that on the 28th of June 1806, he shipped on board the *Venus*, at the port of *Baltimore*, certain goods and merchandizes then belonging to him, viz. 44 hogsheads of clayed sugar, 41 hogsheads brown sugar, 23 barrels of clayed sugar, 101 bags *Carrucas cocoa*, and 508 bags of cotton, which were accompanied by a manifest, bills of lading, and proof of property, in due and regular form. That at the time of making of the policy and shipment, the plaintiff was a citizen of the *U. S.* residing in *Baltimore*. That the schooner *Venus* did regularly clear out on her said voyage from *Baltimore* to *Bourdeaux*, on the 2d of July 1806, and sailed on the 7th, with the above mentioned goods, papers and documents, on board, and in the regular prosecution of her said voyage she was, on the 24th of July 1806, captured on the high seas by a *British* sloop of war, and carried into *Halifax* in *Nova Scotia*, where the goods were libelled as prize, and condemned as such on the 9th of September 1806, in the vice admiralty court there, and thereby totally lost to the plaintiff. The defendants then gave in evidence, that on the 28th of June 1806, the plaintiff took and subscribed in *Baltimore*, and put on board the said schooner, an affidavit to prove his property in the said goods; and also on the 4th of July, in the said year, wrote the following letter, under the signature of *Maniele*, in the *French* language, addressed to his correspondents in *Bourdeaux*, by the name of *Duhally*, (which was not their real names.) "The purpose of this letter is to acknowledge the receipt of yours dated 25th of April, which I have not time to answer by this opportunity, but

shall do so very speedily." And also, on the same day, wrote in the *French* language, in sympathetic ink, upon the paper containing the above letter, another letter addressed to *John Ducorneau*, a citizen of the *French* government, his correspondent in *Bourdeaux*, by his real name, to whom the said goods were consigned. In this letter, amongst other things it is said, "In the hogshead No. 36, under the tail of the J, you will find in the head the authenticated copy of the discharge, upon security of the shipment to the Isle of *France*, of the Ck. the original was sent you by friend R, with whom you will settle for the 101 bags of cocoa on board the *Venus*, the freight of which, on the back of the bill of lading, is £57 5 1, add to this 5 pr. ct. average damage, and it will give the amount of the freight of that article. The 23 barrels of sugar belong to *James Chaytor*, and the freight is £13 17 10, which you will place to his account, and the remainder of the goods is mine. You will give me credit for the nett produce of these 23 barrels." That the plaintiff put both the said letters on board of the schooner, on the day of their date, to be transmitted therein to *Bourdeaux*. That the said letters, together with the affidavit aforesaid, were found on board the schooner at the time of her capture. That the letter in sympathetic ink was not visible at first, and was not discovered until after the arrival of the schooner in *Halifax*, and after her papers, including that letter, were deposited in the office of the court of vice admiralty, where the letter was discovered and rendered legible by the proctor of the captors, by the application of a chymical mixture to the paper; and that the goods, mentioned in the said letter as the property of R, and of *James Chaytor*, were part of the goods so shipped by the plaintiff, and mentioned in the said affidavit as his own. That the paper mentioned and described in the letter written in sympathetic ink, as being concealed in one of the hogsheads of sugar, was, after the discovery of the said letter, actually found so concealed in the said hogshead, by the officers of the court of vice admiralty, and was exhibited and filed in the said court, and purports to be a discharge given at the principal office of *Bourdeaux*, upon security, of goods dispatched for the ports of the republic, and is signed by the Receiver and the Director of Customs at *Bourdeaux*, the 23d Fructidor, year 12, also by the Director of Customs at the

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Isle of *France*, the 11th Thermidor, year 13, and by the commissary of the commercial relations of *France* with *Baltimore* on the 20th of May 1806. It stated that "the officers set over the police of external commerce will allow to pass for Mr. *J. Ducorneau*, merchant, residing at *Bordeaux*, the goods hereafter mentioned bound to the Isle of *France*, or other *French* ports, and not elsewhere, unless compelled by force, of which there shall be the evidence of authentic instruments, upon the ship *Chesapeake* of *Baltimore*, Capt. *Lec*, where they were shipped, as appears by permits of books in this office, reported and clothed with the formalities of shipment, viz. 252 tons three hogsheads red wine; 16,870 gallons red wine in 670 boxes," &c. "The above mentioned vessel is *French*, neutralized at *Bordeaux* the 9th Fructidor, instant, which goods have paid no duties, considering their destination, for which Mr. *J. Ducorneau* has bound himself with Mr. *Constantin*, to make them be carried to the Isle of *France*, or other *French* ports, in the space of 18 months, and to bring back, on the outside of the present certificate, one from the officers of customs or constituted authorities of the place, &c. The defendants also read in evidence a copy of the record of the proceedings in the vice admiralty court at *Halifax*, condemning the whole of the goods on board of the *Venus* at the time of capture, excepting the private adventure of the master, as lawful prize, &c. The plaintiff then gave in evidence, that the papers, so found concealed in a cask of sugar, did not in any manner relate to the schooner *Venus*, or her cargo, or to any part thereof, but to a former shipment of goods made by the said *Ducorneau*, to whom the letter in sympathetic ink was addressed, to the Isle of *France*, and that the 101 bags of cocoa, mentioned in the said letter, was originally the property of *Caze* and *Richaud*, merchants of *New York*, who are the persons meant and intended in the said letter by the name of *R*, and had been before the 1st of June 1806, received for them by the plaintiff, and were by them directed to be sold for their account, by their letter to him of the 7th of June 1806, which letter he read in evidence. This last letter was received by the plaintiff on the 9th of the same month, and not being able to sell the cocoa on advantageous terms, he resolved to take the same on purchase on his own account at a certain price, and to ship the same as his own pro-

party in the *Venus*. That on the 29th of June 1806, he informed *Caze* and *Richaud* of this determination, and of the shipment, by letter of that date, which he gave in evidence, and which letter was received by them on the 2d of July, who dissented immediately from the said purchase, and expressed such their dissent by letter of that date, and which he also gave in evidence. That the said letter was received by the plaintiff on the 4th of July, before the writing of the letter in sympathetic ink; and that in consequence of the receipt of the letter from *Caze* and *Richaud*, and of their dissent therein expressed, the plaintiff relinquished his claim to the 101 bags of cocoa under the said purchase, and did, in and by the letter in sympathetic ink, direct the cocoa to be considered by his correspondent aforesaid as the property of R, meaning *Caze* and *Richaud*. That *Caze* and *Richaud* were natives of *France*, but before the year 1806 were duly naturalized as citizens of the *U. S.* and did then reside in *New-York*. That the 23 barrels of sugar, mentioned in the letter in sympathetic ink, were, before the 5th of June 1806, the property of *James Chaytor*, and were before that day sold by him to the plaintiff, who shipped them as aforesaid, they then being his property; and on the 2d of July, and before the writing of the said letter, *Chaytor*, who is a native citizen of the *U. S.* then residing therein, requested the plaintiff to rescind the said sale, and permit the 23 barrels of sugar to go to *Bourdeaux* in the *Venus* as the property of him, *Chaytor*, and so to mention it to the plaintiff's correspondent; to which the plaintiff consented, through a wish to oblige *Chaytor*, and in consequence thereof, in the letter in sympathetic ink, informed his correspondent, that the 23 barrels of sugar belonged to *James Chaytor*. The plaintiff further gave in evidence, that a claim was put in for the said goods in the vice admiralty court in his behalf, and duly prosecuted, and that after the condemnation, an appeal on his part was duly made, of which appeal, still depending, the defendants had due notice. The defendants then prayed the court to direct the jury, that if they believed the foregoing evidence, the plaintiff was not entitled to recover. This direction the Court, [*Nicholson*, Ch. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before CHASE, Ch. J. and BUCHANAN, and JOHNSON, J.

*W. Dorsey and Harper*, for the Appellant, contended,  
1. That the warranty was not falsified by the concealed papers. They cited *Rich vs. Parker*, 7 T. R. 705. 1 Marsh. 409, 475, 476. 2 Postleth. Dic. tit. *Silesian Loan*, 716. *Park*, 229; and *Livingston vs. The Maryland Insurance Company*, 6 Cranch. 274.

2. That if the risk was increased by those papers, yet that was a fact for the jury to decide; and to vitiate the policy, it must be shown that there were circumstances which increased the risk. *Livingston vs. The Maryland Insurance Company*, 6 Cranch. 274.

3. That the insured need not abandon where there was not a total loss, but may recover for a partial loss. They cited *Gardiner vs. Croasdale*, 2 Burr. 906. *Goss vs. Withers*, Ibid 697. *Watson vs. The Insurance Company of North America*, 1 Binney, 47, 53; and Marsh. 511, 512, 599.

*Martin, Pinkney* (Attorney General, U. S.) and *Purviance*, for the Appellees, contended, that the least variation so as to create a risk, would defeat the insurance, and annul the contract. That the property must not only be *American*, but must have all papers to prove it such, and free from those that might be calculated to call it in question. They cited Marsh. 406, 407, 408, 409, 411, 398, 183, 203, 281, 473. *Park*, 242 to 252, 264, 265, 272, 273, 387, 388, 408. *Middlewood vs. Blakes*, 7 T. R. 163. 1 Rob. 111. *Blagge vs. The New York Insurance Company*, 1 Caine's Rep. 549. *Vandenheuvel vs. The United Insurance Company*, 2 Caine's Cases, 217, 222. *Erousilat vs. Ball*, 4 Dall. Rep. 295. *The Chesapsake Insurance Company vs. Stark*, 6 Cranch, 268, 270, 273. *The Maryland Insurance Company vs. Le Roy*, 7 Cranch. 26. *Chitty's L. N.* 314, 315. *Lee on Captures*, 130. *Vattel*, 339. *Goix vs. Low*, 1 Johns. Ca. 346. *Pollard vs. Ball*, 8 T. R. 444. *Livingston vs. The Maryland Insurance Company*, 6 Cranch. 279. 1 Rob. 104, 106, 139; and 2 Rob. 13, 294, 295, 133, 134, 89, 91.

CHASE, Ch. J. delivered the opinion of the court. The most important question in this case is, whether the war-

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warranty has been fulfilled? In my opinion the concealed papers, the artifice practised to prevent detection of them, the fictitious names used, and the mystery in which the whole are enveloped, contradict and discredit the legal documents, (the bill of lading, manifest and affidavit, of the appellant *John Carrere*,) which cover the whole property insured as his property. These circumstances are inconsistent with good faith, that purity of intention and fair dealing, which should be the concomitants of every policy of insurance, and contaminate the whole transaction by indicating a fraudulent design of covering property not the property of the appellant, and justly exciting suspicion that the property belonged to the enemy of the belligerent making the capture. The documents being falsified in part were deprived of all credit, and the warranty was not complied with.

Although the concealed papers were not known at the time of the capture, yet being on board of the vessel, and discovered at the time of the trial in the court of admiralty, they were a justifiable cause of capture and detention, and from their suspicious aspect, precluding further proof and explanation, violated the warranty.

JUDGMENT AFFIRMED.

## BUCHANAN'S LESSEE VS. STEUART.

DECEMBER.

APPEAL from *Baltimore County Court*. This was an action of ejectment for all that part of a lot of ground situate in the city of *Baltimore*, being part of a lot of ground distinguished on the plot thereof by the number 25, beginning for the said part at the end of 115 feet from the S W corner of *Conawago* and *Charles-streets*, where they intersect each other, and running thence, binding on *Charles-street* 27 feet to *Mushberger's* line, thence westerly 150 feet 6 inches, more or less, to *Liberty*, or 10 feet lane, thence N Easterly, binding on said *Liberty* or 10 feet lane 36 feet, and thence with a straight line to the beginning. The defendant, (now appellee,) took defence on warrant, and plots were made.

1. At the trial the plaintiff offered in evidence a grant to *Thomas Todd* for *Todd's Range*, dated the 8th of

T and E, by their deed of bargain and sale, conveyed to R "all that lot or parcel of ground situate and lying in *Baltimore-town*, which is known and distinguished on the plot of said town by the No. 25, and beginning for the same at," &c. describing the same by courses and distances, "to have and to hold the same, and every part thereof, unto the said R," &c. — Held, that the whole of the lot passed by the general description of all that lot No. 25, although it was not included within the special description by course and distance.

Parol evidence is inadmissible to prove that it was the intention of a grantor, in a deed of bargain and sale, to convey a lot of ground by the courses and distances used therein, and not to convey the whole lot.

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August 1720. And proved that the lot of ground designated on the plot exhibited, and which was made evidence by the consent of the parties, beginning at A and running to B, to C, to D, and thence to A, was and is part of *Todd's Range*, and is a true location of the lot of ground distinguished on the plot of the city of *Baltimore* by the lot No. 25; and that a certain *Richard Croxall*, being seized of the said lot of ground, by his last will dated the 10th of April 1783, devised to his wife *Eleanor Croxall*, and her heirs, all that part of the said lot of ground; which is described as follows on the plot—Beginning at F, running to B, to C, to 12; thence to F. The other clause in the will, necessary to be mentioned, was—“I also give my nephew *Richard Croxall*, his heirs and assigns, for ever, my tracts of land called,” &c. “also part of the lot or lots of land, with the improvements thereon erected, lying and being in *Baltimore-town*, within the following limits, viz. Beginning at the first beginning of the lot number 28; at the intersection of *Charles* and *Market-streets*, and running thence, bounding on *Charles-street*, then W until it intersect the ground leased by me to the said *Andrew Buchanan*, then bounding on the said ground, and running S until it intersects *Market-street*, then bounding on *Market-street* E to the beginning, save and except thereout the part of the said lot conveyed by me to the said *Andrew Buchanan*, on which his warehouse is erected on *Charles-street*; and also save and except part of the said lot already conveyed by me to my nephew *James Croxall*, and also save and except my brick warehouse, with the ground it stands on, which is lately sold. I also do appropriate, and it is my will and desire, that the ground under the following limits shall be open for an inlet to my improved ground, so long as the owner or possessor of the said improved ground may think it convenient or proper, viz. Beginning at the N end of *Andrew Buchanan's* warehouse, and running N on *Charles-street* 13 feet W parallel with *Market-street*, to *Andrew Buchanan's* ground, then S 13 feet parallel with *Charles-street*, then E parallel with *Market-street*, to the beginning. Item. I give and bequeath to my nephew *Richard Croxall*, his heirs and assigns, for ever, the part of my unimproved ground in *Baltimore town*, under the fol-

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lowing limits, viz. Beginning at the distance of 43 feet from the N end of *Andrew Buchanan's* warehouse, and running thence and bounding on *Charles-street* 99 feet, then W parallel with *Market-street*, to intersect the western limits of my said ground, then bounding on the said limits and *Andrew Buchanan's* ground, until it intersects the W line of the ground conveyed by me to *Rachel Croxall*, and her son *Richard*, and thence E parallel with *Market-street* to the beginning. *Item.* I give and bequeath to my niece *Mary Howard*, her heirs and assigns, for ever, part of my improved ground in *Baltimore town*, under the following limits, viz. Beginning at the distance of 142 feet from the N end of *Andrew Buchanan's* warehouse, and running thence N on *Charles-street* 33 feet, then W parallel with *Market-street* to intersect the western limits of my said ground, then with the said limits until it intersects the W line of my bequest by this my will to my nephew *Richard Croxall*, and then E parallel with *Market-street* to the beginning. *Item.* I give and bequeath to my dear and loving wife, her heirs and assigns, for ever, all the remaining part of my unimproved ground in *Baltimore town*, under following limits, viz. Beginning at the distance of one hundred and seventy-five feet from the N end of *Andrew Buchanan's* warehouse, and running thence N on *Charles-street* to the utmost limits of the said ground, then on *Conawaugoe-street* with the extent thereon, then with the lane until it intersects the W line of my bequest to my niece *Mary Howard*, and then E parallel with *Market-street* to the beginning." "And in case my said nephew *Richard Croxall*, should not be living at the time of my decease, but not otherwise, then it is my will, and I do hereby give and devise to my nephew *James Croxall*, all the real estate," &c. "I have by my said will given and devised to my said nephew *Richard Croxall*," &c. *Richard Croxall*, the testator, afterwards died seized of the said lot of ground, and *Eleanor Croxall*, after the death of *Richard*, and on the 6th of February 1804, by deed duly executed, acknowledged and recorded, conveyed to the lessor of the plaintiff, *George Buchanan*, and his heirs, all that part of the said lot of ground so as aforesaid devised, which is described on the plot as follows, and for which the present ejectment is brought—Beginning at M, running to N, to C, to O, thence to M. The said

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part is described in the said deed as follows, to wit: "All that part of a lot of ground, situate and being in the city of *Baltimore*, being part of the original lot of *Baltimore-town*, distinguished on the plot thereof by the number 25, beginning for the said part hereby given," &c. "at the end of 115 feet from the S W corner of *Conawago* and *Charles-streets*, where they intersect each other, and running thence parallel and binding on *Charles-street* 27 feet, to *Mushberger's* line, thence westerly 150 feet 6 inches more or less, to *Liberty* or 10 feet lane, thence N easterly binding on said *Liberty* or 10 feet lane, 36 feet, and thence with a straight line to the beginning." The plaintiff further proved, that *Charles-street* and *Conawago-street* in the city of *Baltimore*, are truly located on the plot. The defendant claimed title to all that part of lot No. 25, which is designated on the plot as follows: Beginning at N, running to B, to C, and thence to N. And to shew a title in *Thomas Gittings* and *Eleanor Croxall*, under whom he claimed, and that *Richard Croxall* did not die seized of the property described in the ejectment, read in evidence a deed from *Richard Croxall* to *Thomas Gittings*, dated the 22d of March 1784, for "all that lot or parcel of ground situate and lying in *Baltimore-town*, which is known and distinguished on the plot of said town by the No. 25, and beginning for the same at the N end of *Charles-street*, on the W side thereof, where it intersects *Conawago-street*, and running thence S, bounding on *Charles-street*, 60 feet, thence W to *Liberty-lane*, then with the lane to *Conawago-street*, then with *Conawago-street* to the place of beginning. To have and to hold the said lot or parcel of ground above described, and premises, unto the said *Thomas Gittings*, his heirs and assigns, forever, &c." And a deed from *Thomas Gittings*, and the before mentioned *Eleanor Croxall*, to him the defendant, dated the 8th of May 1801, for "all that lot," &c. (describing it as mentioned in the above deed from *Richard Croxall* to *Thomas Gittings*.) "to have and to hold the same and every part thereof, unto the said *Richardson Steuart*, his heirs and assigns," &c. The defendant further gave in evidence, that the deed from *Richard Croxall* to *Thomas Gittings*, not being recorded within the time prescribed by law, an application was made by *Thomas Gittings* to the court of chancery for the purpose of having the said

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deed recorded according to the act of assembly in such case made and provided, and that after due proceedings were had thereon, the chancellor, by his decree dated the 15th of May 1802, ordered said deed to be recorded, which was done. The plaintiff then proved, that the ground included in the metes and bounds, courses and distances, mentioned in the said two last mentioned deeds, begins on the plot at H, and runs to I, to J, to K, and then to H. He further proved, that that part of lot No. 25, which is devised by the will of *Richard Croxall* to *Mary Howard*, is truly located on the plot as follows: Beginning at 1, running to N, thence to C, thence to 2, thence to 1. And that *Mary Howard* died before *Croxall*, the testator. And that that part of lot No. 25, which was devised by *Richard Croxall* to *James Croxall* by said will, beginning on the plot at A, runs to 1, to 2, to D, to A, and that *James Croxall* was, at the death of *Richard Croxall*, his sole heir at law. He also proved by *James Croxall* that *Thomas Gittings* never made any claim on him, or set up any title or claim, to his knowledge, to that part of lot No. 25 which he, *James Croxall*, took under the will of *Richard Croxall*, or to that part of lot No. 25 which he, *James Croxall*, inherited as heir at law to the said *Richard Croxall*. The defendant then prayed the court to direct the jury, that upon the foregoing facts, and under the construction of the aforesaid deeds, the plaintiff was not entitled to recover. This opinion the court, [*Nicholson Ch. J.*] gave to the jury. The plaintiff excepted.

2. The plaintiff then prayed the court to direct the jury, that if they should be of opinion from the evidence, that it was the intention of *Richard Croxall* to convey to *Thomas Gittings* only that part of lot No. 25 which is contained in the metes and bounds, courses and distances, expressed in the deed from *Richard Croxall* to *Thomas Gittings*, and that it was the intention of *Thomas Gittings* and *Eleanor Croxall*, only to convey to the defendant that part of lot No. 25 which is contained in the metes and bounds, courses and distances, expressed in the deed from *Eleanor Croxall* and *Thomas Gittings* to the defendant, then the plaintiff was entitled to recover. The court refused to give this direction. The plaintiff excepted; and the verdict and judgment being against him he appealed to this court.

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The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE and JOHNSON, J.

*W. Dorsey, Harper and Brice*, for the Appellant, stated that the question was, whether or not the whole of lot No. 25 was conveyed by the deed from *Richard Croxall* to *Thomas Gittings*, or only the part agreeably to the particular description in that deed? They contended, that there being two descriptions in the deed, one general, and the other special, the special description was to govern. They referred to *Shep. T.* 89, 95, 99, 100. *Co. Litt.* 42. *Hawkins vs. Hanson*, 1 *Harr. & M'Hen*, 523. *Helms's Lessee vs. Howard*, 2 *Harr. & M'Hen*, 87; and *Carroll et al. Lessee vs. Norwood*, 1 *Harr. & Johns*, 173.

*Martin*, and *Pinkney* (Attorney General U. S.) for the Appellee, cited *Shep. T.* 88, 95, 98, 99, 246. *Bac. Ab. tit. Grant*, (H) 662. *Lodge's Lessee vs. Lee*, 6 *Cranch*, 237. The act of 1715, ch. 47, s. 10. *Carroll et al. Lessee vs. Norwood*, (5 *Harr. & Johns*, 163, 164.) *Gittings Jrs. Lessee vs. Hall*, 2 *Harr. & Johns*, 117. *Howard vs. Moale, et al. Lessee*, *Ibid* 249, 263. *Dorsey's Lessee vs. Hammond*, 1 *Harr. & Johns*, 193; and *Co. Litt.* 183.

CHASE, Ch. J. delivered the opinion of the court. The question in this case arises on the legal effect and operation of the deed from *Eleanor Croxall* and *Thomas Gittings*, to *Richardson Stewart*, the defendant below, as to the quantity of the land conveyed by it to *Stewart*. In deciding this question, the court must be governed by those rules and principles of the law, which have been established by the courts of justice, and resorted to by them in expounding deeds.

It is true, and has been conceded, that there are no technical or precise form of words appropriated by law, as exclusively or particularly necessary in the description or designation of the thing to be granted.

It is equally well established, that the intention of the parties should prevail in expounding deeds, if not repugnant to some principle or maxim of the law, which is to be collected from the whole of the deed.

It is a position not to be controverted, that a deed is to be construed most beneficially for the grantee, whenever there is a necessity for resorting to that maxim.

The apparent intention on the face of the deed is, that all of the lot No. 25, should pass to the grantee. And the general words, All the lot No. 25, and which is known and distinguished on the plot of the town by No. 25, are fully competent to transfer the whole; there is nothing in the additional description by course and distance, from which it can be intended or inferred, that the general description was to be limited or modified; but it is to be presumed that it corresponded with the general description, and was inserted to define the location of the lot No. 25, and show its true position; and there is not any thing appearing in the deed indicative of an intention to convey less than the whole lot.

On the location of the lot No. 25, according to its true limits, it appears that 60 feet south with *Charles-street* will not extend to the end of the line of that course; so as to gratify the subsequent runnings, and include the whole of the lot No. 25, in conformity to the general description.

What then is the true construction of the deed, having respect for the principles laid down? If the specific or additional description is adhered to, the general description must be rejected, and the intention of the parties, apparent on the deed, disregarded, and a construction will prevail in subversion of the principle, which declares that the deed shall be construed most beneficially for the grantee.

By elongating the south course to the end of that line, the general description is complied with, the subsequent runnings gratified, the whole of the lot included, and the apparent intention of the parties fulfilled; or if the general description is adhered to, and the particular rejected, the intention of the parties appearing on the deed will be effectuated, and a construction given most beneficial for the grantee.

The collateral circumstances, that the grantors did not hold all the lot No. 25, cannot affect the construction. The deed will pass the whole, if they had the whole, or whatever part they possessed less than the whole, and it cannot be inferred, from that circumstance, in contravention of what appears in the deed, that it was intended by the parties to transfer only that part included within the specific or additional description, and more especially as the grantors, at the time of making the deed, held more of the lot than is contained within the said description.

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The Court concur with the court below in the opinions expressed in each of the bills of exceptions.

BUCHANAN, J. This case depends upon the true construction of the deeds from *Richard Croxall* to *Thomas Gittings*, and *Thomas Gittings* and *Eleanor Croxall* to *Richardson Stewart*, and the only question for decision is, whether they respectively passed the whole of the lot No. 25, or only so much thereof as is embraced within the courses and distances expressed? The leading principle in the interpretation of deeds is, that the construction be made upon the whole of the deed taken together, and not upon disjointed parts of it, so that every part, if possible, be made to take effect, as nearly, according to the intention of the parties, as the rules of law will admit. No technical form of words is necessary, but the parties, who may be presumed acquainted with the subject matter of the contract, are left to the use of such words of description as are best suited to the thing intended to be conveyed. The construction, therefore, should be, "reasonable and agreeable to common understanding." With this guide I have endeavoured to arrive at the intent and meaning of the parties to the deeds in question, and it appears to me that no more of lot No. 25 was intended to be passed, than that part which is embraced within the courses and distances set out.

The courses and distances include but a very small proportion of the whole lot, and it is difficult to believe that *Croxall* and *Gittings* did not know the extent of the lot at the time of executing the deed between them, and that the courses of that deed included only a part of it. If the courses had been omitted, the whole lot would have passed by the preceding general words of description, "all that lot," &c. and it would have been unnecessary to resort to courses and distances, or any other description, if it was the intention of the parties that the whole should pass. It is evident then, that the parties did not mean to effect their purpose by the use of the general description or designation of the lot, by its number on the plot of *Baltimore-town*, or to rely upon it as the description of the thing intended to be conveyed; for if they did, they would not unnecessarily have resorted to another more precise. The object, therefore, of inserting the courses

and distances, seems to have been to designate particularly what was intended to be conveyed.

To rely upon the number of the lot alone for coming at the intention of the parties, would be to exclude the courses and distances, or qualifying expressions, in violation of the rule, that "the construction be made upon the entire deed, and not merely upon disjointed parts of it," the courses and distances evidently appearing upon the plots in the cause, not to be co-extensive with the whole lot.

But if the rule is adhered to, each part of the description will have its office, the number of the lot, as designating the general object of the parties in pointing out the place or thing to which the courses and distances are meant to be applied, and the courses and distances as restricting the general object, and defining the particular part of it intended to be conveyed. There is no necessity for rejecting either part of the description, but the generality of the first part may, and, I think, ought to be restricted by the latter, to come at the intention of the parties, and thus every part of the deed may be gratified.

It is laid down in books of authority, that if a man grants "*his manor of Dale*," without saying where it lies, it is a good grant, and the whole manor passes; but that if he grants "*his manor of Dale in Dale*," and a part of the manor lies in *Dale*, and a part in some other place, that part of the manor only which lies in *Dale* will pass, and for this reason, that the general description by name, which if it stood alone would pass the whole manor, is limited and restricted by the subsequent qualifying words *in Dale*, which show the *intention* of the parties, that no more than the part lying in *Dale* should pass.

In this case the grant is of "all that lot or parcel of ground situate, lying and being in *Baltimore-town*, which is known and distinguished on the plot of said town by No. 25, and beginning for the same at the south end of *Charles-street* on the west side thereof, where it intersects *Conawago-street*, and running thence south, binding on *Charles street*, sixty feet, thence west to *Liberty-lane*, then with the lane to *Conawago-street*, then with *Conawago-street* to the beginning."

The words "situate, lying and being, in *Baltimore-town*," are certainly only descriptive of the place where

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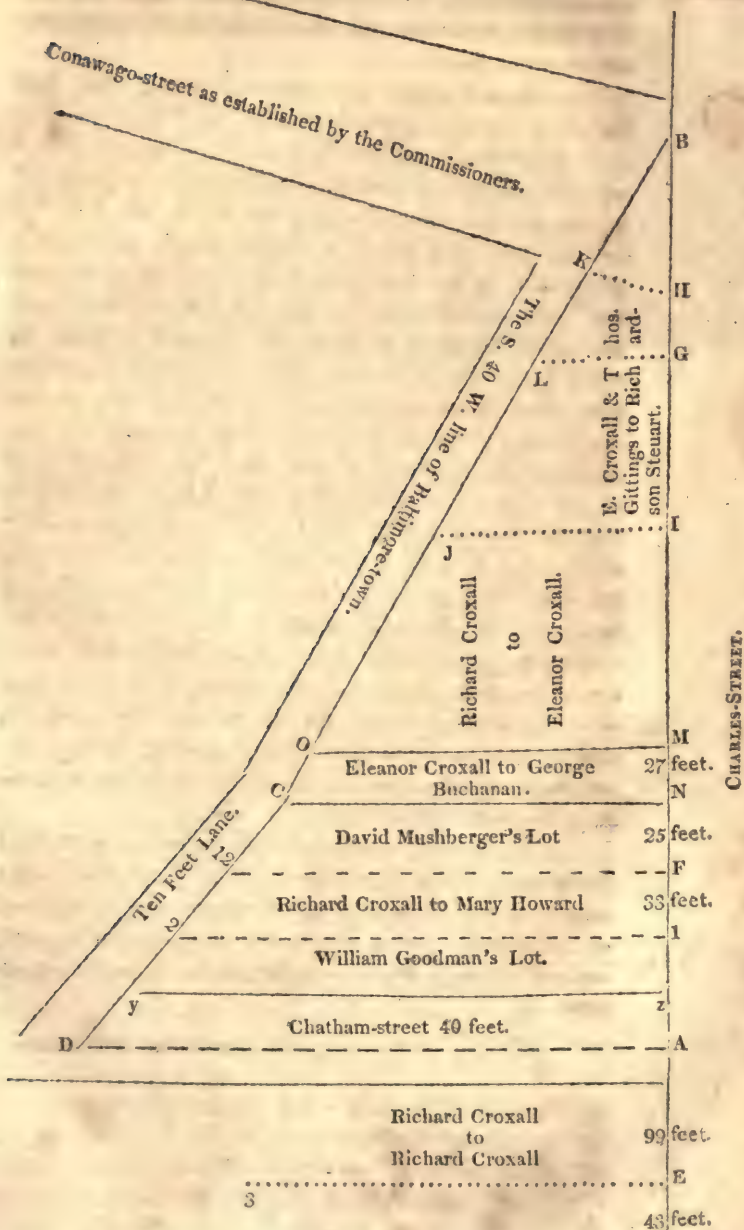
the lot lies, and no other office can be assigned them, and the only office of the words "known and distinguished on the plot of said town by No. 25," is to set out the name or number of the lot; and can have no more force than any other description of land by name would have in the construction of a deed.

The case then stands as if the expressions were "all that lot or parcel of ground called No. 25," which certainly are not more general than the words "my manor of Dale," and the subsequent qualifying expressions "beginning," &c. are not less restrictive than the words "in Dale," in the case put, from which, and other similar and equally strong cases to be found in the books, I cannot distinguish this. The case of *Lodge vs. Lee*, cited from *Cranch*, and the cases of *Gittings vs. Hall*, and *Howard vs. Moale*, do not, I think, affect this case. The intention of the parties, when it can be ascertained, and not the strict and precise signification of the words used, is to be regarded; the true construction, therefore, of every deed, must depend upon its own expressions, and in this case, without resorting to the rule "*verba fortius accipiuntur contra proferentem*," which is not favoured in law, and "never to be relied upon but where all other rules of exposition fail;" but construing the deed from *Richard Croxall* to *Thomas Gittings*, according to the intention of the parties, as it seems manifest to me, I am of opinion, that nothing more passed than what is contained within the courses and distances; and that the deed to *Richardson Stewart*, having the same expressions with those used in the deed to *Gittings*, must receive the same construction.

It is therefore my opinion, that the appellant is entitled to recover, and that the judgment of the court below ought to be reversed on the *first* bill of exceptions, but affirmed on the *second*, it being clearly the province of the court, and not the jury, to give construction to the deeds in question.

JUDGMENT AFFIRMED.

*Plot referred to in the case of Buchanan vs. Stewart.*





HODGSON VS. PAYSON &amp; LORMAN.

[DEC. 1813.]

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainant, (now appellant.) The case is sufficiently stated in the decree of the chancellor.

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Where a factor endorses bills for his principal, such liability, with a reasonable apprehension of danger, gives him as factor a lien on other bills then in his hands belonging to his principal, to meet the event of his indorsement; and the fact of the factor's receiving a commission on his endorsements, does not in any way affect the general question as to his lien as factor.

KILTY, Chancellor, (July term 1807.) The object of the complainant is to be released from the payment of an inland bill of exchange, drawn by him on his agent, *Clementson*, for \$5,333 33, accepted by *Clementson*, and endorsed by *R. Murray, & Co.* in whose favour the bill was drawn, to *Payson*, one of the defendants, for collection, and not as a payment to him, and by *Payson* endorsed to *Lorman*, the other defendant. The bill in the conclusion prays that the defendants may be compelled to bring the said bill of exchange into court, to be delivered up to the complainant, or that they be compelled to pay to him the full amount for which it was drawn, with legal interest thereon; and there is a prayer for general relief. The answer, after relating the manner in which the bill, (with another which had been paid,) was received, and the time, states, that before and after that time *Payson* was employed by, and transacted business for, the said *R. Murray, & Co.* on commission, and particularly in selling and endorsing their bills of exchange. That before the acceptance of *Clementson* became due, he (*Payson*,) had sold and endorsed for *R. Murray, & Co.* bills of exchange drawn by them for upwards of £20,000 sterling, and that finding he was in danger, and could get no other indemnity, he considered himself entitled to hold the acceptance as the creditor of *R. Murray, & Co.* for his security to the extent thereof. *Payson* further states, that he is wholly ignorant of the consideration of the bill, (which consideration was set forth and relied on by the complainant,) and in the conclusion of the argument of the counsel of the defendants, it is remarked, that the claim of the complainant against *R. Murray, & Co.* is not in any shape admitted, and that it is believed nothing is due to him.

After a consideration of every part of the proceedings, the chancellor is not satisfied that the complainant has made out a case to entitle him to the aid of this court, independent of the lien set up by the defendant.

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[The chancellor here examined some questions of fact, but as they were not made the grounds of his decree, or of the decree of the court of appeals, it is thought unnecessary to give that part of his opinion.]

The chancellor, however, does not mean to give so decided an opinion on this part of the case as to make it the ground of his decree, although it may influence him in regard to the costs. As to the other parts, there are some points so clearly established, as not to admit of any doubt, and others, (and among them the one most material,) that are more questionable.

When the complainant delivered *R. Murray & Co.* at *New-York*, the bill drawn on *Clementson*, he empowered them to negotiate it as they might think proper, subject, when negotiated in due time, to be paid by him. on the failure of *Clementson*, without any inquiry into the consideration, which, against a *bona fide* holder for a valuable consideration, he was not competent to go into. If then *R. Murray & Co.* instead of sending it to their agent had passed it away for goods, or in payment to a creditor, the liability of *Clementson*, the acceptor, and of the complainant, as drawer, would have been fixed, leaving the latter to his remedy against *R. Murray & Co.* on their sale or exchange of the seven bills on *London*.

Supposing no other person to have had a just claim, it was competent for the complainant to stop the payment of the bill on *Clementson*, or of *R. Murray & Co.* to give it up in consequence of the consideration failing.

If the bill had come into the hands of the assignees of *R. Murray & Co.* on their bankruptcy, it would have been subject to the equitable lien against the firm, and it might have been a question how far the bill, being given for the specific consideration of the seven bills drawn on *London*, which were protested, and not on a general account, should operate in favour of the complainant against the general creditors. It appears clearly, that after the delivery of the bill on *Clementson* to *R. Murray & Co.* and their endorsement of it to *Payson*, the right of the complainant, on obtaining the order of the 23d of July 1796, to deliver up the bill, could not be better than that of *R. Murray & Co.* would have been if the order had not been made. And it may here be noticed as an undeniable principle, that the complainant had not the power, by his election, of this

mode of securing himself, to vary the rights of *R. Murray*, & Co. and their factor. A consideration, therefore, of the right and remedy in that case of *R. Murray & Co.* will lead to that of the defendant, *Payson*, as their factor, on which the event of this cause must rest.

The bill having been endorsed to *Payson*, not in payment, but as agent or factor, and for collection only, it follows of course, that he had it subject to the order of his principal, unless he could show a right to retain it, and that in the mean time it was his duty to receive the money, which, (with the same exception) would be also subject to their order.

The chancellor considers the situation of *Payson*, as factor, sufficiently established by proof to entitle him to all the advantages resulting from that character.

✓ If, upon the general balance of the account between *R. Murray* and Co. and *Payson*, they had been, at the time of the order for delivery, or of any demand by them, indebted to *Payson*, there could be no doubt, on principle or on authorities, of his right to retain; and the right, (supposing the balance so due,) would be the same, whether the property in his hands consisted of money, goods, negotiable paper, or other evidences of debts.

There is certainly no evidence of any balance being actually due to, or any claim by *Payson*, excepting his liability on the bills which he had endorsed; and therefore it remains to be examined, whether this liability, with the apprehension of danger, as far as it appears to have been reasonable from the evidence in the cause, gave to him as factor a lien on the bill in question to meet the event of his endorsement, such as he would have had upon the general balance of his account? This question is to be determined according as the principle may appear to be established, independent of the entries or charges made by *Payson* in his books, which is not considered a very material circumstance. And it must be observed also, that the fact of *Payson's* receiving a commission on the endorsement of bills is not viewed as in any way affecting the general question as to his lien as a factor.

The chancellor has examined the authorities cited by the counsel, (some of which are relied on by both parties,) and such others as he has been able to find having a bearing on the question; and he does not find it so fully

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determined on either side, as might have been expected in a transaction which must frequently occur between principal and factor; but from these authorities, as far as they go, and reasoning from analogy, and the justice of the position, he is led to determine that the lien does exist in the one case as well as in the other.

The expression of Lord Mansfield in *Godin vs. The London Assurance Company*, 1 Burr. 489, and 1 W. Blk. Rep. 103, is, that a factor to whom a balance is due, has a lien upon all goods of his principal, so long as they remain in his possession; and in *Kruger vs. Wilcox*, Amb. 252, therein referred to, it is laid down, that if there is a course of dealings, and general account between the merchant and factor, and a balance is due the factor, he may retain for such balance. In *Drinkwater vs. Goodwin*, Cowp. 251, Mr. Buller, for the plaintiffs, argued, that all the money paid by the factor was paid since the action, so that at the commencement of the suit, the factor was no creditor at all. And although this was admitted, it was determined that he had a lien to the amount for which he was bound in the bond, though not paid till after the suit. The reasons for this decision, however, are not sufficiently clear. The judge observed, that the agreement was, that the factor should have a lien; whereas there was no express agreement to that effect, and it could be only an implied one. He then used the following remark—"The factor knew very well that for a general balance of his account he had a lien; but he doubted whether such lien would extend to a case in which he is only surety for his principal, and therefore he proposed the terms contained in the letter." This doubt is not resolved by the court, any further than by inference from their decision in the suit. The right of the principal to maintain an action for goods sold by his factor, against the purchaser, and to sue for the property remaining in the factor's hands, are in the above case considered on the same footing, and both qualified with this restriction, namely, that the principal is not indebted to the factor. The doubt or uncertainty which has been mentioned of its extending to the case of the factor being only a surety, still remains, but the chancellor considers the determination on the whole as favourable to the lien claimed by Payson; and he observes, that *Espinasse*, (2 Dig. 582,) lays it down as a principle found-

ed on the same case; that a factor has a lien for any moneys due, or for any engagement he enters into on account of his principal.

The case of *Davis vs. Bowsher*, 5 T. R. 488; establishes the position, that no person can take any paper securities out of the hands of his banker, without paying him his general balance; but the chief justice states, that the party had a right to demand the bill on paying all that was then due to the banker.

In *Kinlock vs. Craig*, 3 T. R. 119; 783; it appears from the special verdict that the factors had accepted bills to a large amount on the faith of promised consignments of goods, and were thereupon considered as having a balance due to them, although they had (independent of their acceptance,) the sum of £2382 in their hands, belonging to the company. The decision was made on the ground of their having never had the possession of the goods; from which it may be inferred, that if the possession had been with them, they would have had a lien to the amount of their acceptance, though not then paid. The Chief Baron, in delivering the opinion of the judges in the House of Lords, stated that the bankrupt could have no lien, as the goods never got into his possession. He remarked also, that the promise to consign the goods was an executory agreement, for the nonperformance of which, only a right of action accrued, but that no property in the goods was thereby vested in the consignees. It does not, however, follow from this remark, that if the property had been vested by its getting into their possession, they would have been bound to give up their hold upon it, and to resort to their action on the agreement.

In the case of *Jourdaine vs. Lefevre*, 1 Esp. Rep. 66, Lord Kenyon expressed his opinion that a banker, in a transaction such as the one before him, had a lien on a note so paid in, and of course a right to retain it for his balance, or as a security for a general account between him and the party who paid it in.

In reasoning on the analogy of the cases, the chancellor cannot perceive any reason or equity in restricting the lien of a factor to a balance actually due, instead of extending it to engagements by which he is bound, and for which he must afterwards be a debtor, unless relieved by his principal; and he does not perceive with what semblance of jus-

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tice a principal could demand of his factor the payment of \$5000 in his hands, when the factor might be obliged to pay the like sum for him the succeeding week, without a prospect of indemnity.

The particular times at which such retainers may be resorted to, and the amount of them, must depend on the relative situation of the parties in each case; but it may be observed, that if the danger is slight or remote, it is the more easily guarded against by a counter security to the factor.

In the present case, the chancellor is of opinion, that the defendant, *Payson*, was justified in refusing to deliver up the acceptance of *Clementson* on the order of *R. Murray, & Co.* on the ground of his engagements as endorser for them; taking into consideration also the facts proved in the case, the benefit of which he is entitled to, even supposing that he might have succeeded with less proof.

It appears that his apprehensions were not groundless—That he was called on, and actually paid on his endorsements, (although the time is not stated,) sums exceeding the amount of *Clementson's* acceptance, which if he should be entitled to retain it, will go only in part towards his reimbursement.

If the right of *Payson*, as against *R. Murray, & Co.* is established, he must, as against *Clementson*, the acceptor, and the complainant as drawer of the bill, be considered as a *bona fide* holder for a valuable consideration; and therefore the consideration for making the bill cannot, against him, be inquired into.

The dispute resting between the complainant and *Payson*, it is not necessary to say any thing as to the other defendant, *Lorman*, who has been otherwise paid. But with respect to *Payson's* creditors, for whose benefit the defence to this suit may be set up, it is proper to remark, that they are entitled to whatever was his right; and also that it was an act of justice in him to do for his creditors what a proper regard for his own interest would have induced him to do for himself.

It appears that when the bill was filed, an injunction was prayed for to prevent the defendants from delivering to any person, or negotiating the accepted bill; but as a bond was not filed, no order was taken on that part of the application, and there is nothing to show in what situation

the bill is now held—*Decreed*, that the bill be dismissed with costs. The complainant appealed to this court.

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The cause was argued before CHASE, Ch. J. and BURGHANAN, and NICHOLSON, J.

*Martin*, for the Appellant, contended, that the endorsing of bills by *Puyson* was not such a transaction as constituted him a factor; that buying and selling bills constituted the party a factor; but it was not within the character of a factor to endorse bills, and he could not retain a lien for any balance of account or supposed liability.

*W. Dorsey*, for the Appellees, referred to *Jourdain* vs. *Lefevre*, 1 *Esp. Rep.* 66; and *Walker* vs. *Birch*, 6 *T. R.* 258.

DECREE AFFIRMED.

DICKINSON VS. HASLET.

DECEMBER.

APPEAL from *Baltimore County Court*. *Assumpsit* for money had and received, for money laid out and expended, and for money lent and advanced, brought by a shipper of goods against the captain and consignee of the cargo, to recover money retained for freight, &c. The general issue was pleaded.

1. At the trial the plaintiff, (now appellee,) gave in evidence a bill of lading, dated the 11th of March 1806, of certain goods shipped by the plaintiff on board the schooner called *The Experiment*, whereof the defendant was master, on a voyage from *Baltimore* to *Barbadoes*, or a market, to be delivered to the defendant, or to his assigns, he or they paying freight for the said goods, &c. one half the freight to be paid at the port of delivery, and the other half upon the return of the schooner to *Baltimore*, with primage and average accustomed. He further gave in evidence an account rendered by the defendant to the plaintiff, charging him with 5 pr. ct. commission, transient and county tax, freight, storage, and a bill of exchange, and crediting him with the proceeds of the sale of the cargo. That the schooner *Experiment* sailed from the port of *Baltimore*, on her said voyage, on the 14th of March 1806, and on the 31st of the same month arrived at the Island of *Bermuda*; and that the goods mentioned in the bill of lading were there landed

In an action by a shipper of goods against the consignee of the cargo, to recover money retained for freight—*Held*, that the plaintiff was at liberty to show the vessel not to have been sea worthy at the commencement of her voyage, in order to resist the defendant's claim to freight; and if the jury believed the vessel not to have been sea worthy, and competent to perform the voyage at the time of its commencement, then that the defendant was not entitled to retain any thing for freight, and that the plaintiff was entitled to recover the amount so retained.

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and sold by the defendant. And in order to show that the defendant was not justified in retaining the amount of freight charged in the account aforesaid, the plaintiff offered in evidence, that the said vessel, at the commencement of the voyage from the port of *Baltimore*, was not in a state of sea-worthiness, and that she was not competent to the performance of the voyage. To this testimony the defendant objected. But the court, [*Nicholson*, Ch. J.] was of opinion that the plaintiff was at liberty to show the vessel not to have been sea-worthy at the commencement of her voyage, in order to resist the defendant's claim to freight. The defendant excepted.

2. The defendant then gave in evidence, that he invested the nett proceeds of said sales, in the account mentioned, in a bill of exchange stated in the account, and with the said bill purchased merchandize, which he delivered over to, and which was accepted by, the plaintiff, at *Baltimore*. The plaintiff then gave in evidence a protest made on the 14th April 1806, by the defendant, before the captain general, &c. of the Island of *Bermuda*, stating, that on the 14th March 1806, he sailed in the schooner *Experiment* as master, from *Baltimore* for the Island of *Barbadoes*, and a market, with a cargo on board consisting of flour, &c. That proceeding down the bay, his main boom having been carried away in a squall, he put into *Severn* river to get a new one. That on the 21st March 1806, having got a new main boom, he sailed from the river aforesaid, &c. That on the 24th March 1806, in the *Gulph* stream, he met with a heavy gale of wind from the N E, which made a breach over the said schooner fore and aft; that to get out of the gulph he thought it advisable to run to the westward. That shortly afterwards a tremendous sea struck *The Experiment*, and hove her down on her beam ends, &c. That on the 29th his mate and crew declared the said schooner, from the injuries received in the repeated gales of wind since her leaving the land, was unfit to proceed on her destined voyage, and that they thought it for the interest of all concerned to make the nearest port. That he directed his course to *Bermuda*, where he arrived on the 31st, and visited the governor, and noted his protest. That a warrant to survey the schooner was obtained, and the gentleman named to survey, reported her not sea-worthy, and condemned

her accordingly. The defendant then prayed the court to direct the jury, that on the evidence above given the plaintiff was not entitled to recover. But the court were of opinion, and so directed the jury, that if they should believe the vessel not to have been sea-worthy, and competent to perform the voyage at the time of its commencement, that then the defendant is not entitled to retain any thing for freight, and of course that the plaintiff may recover in this action the amount so retained by the defendant. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before BUCHANAN, EARLE, and JOHNSON, J. by

*Brice*, for the Appellant; and by

*Purviance*, for the Appellee.

JUDGMENT AFFIRMED.

POTTENGER'S EX'X. *et al.* VS. STEWART, *et ux.*

DEC. 1813.

APPEAL from a decree of the Court of Chancery. The case, so far as is material, appears to be fully stated in the chancellor's decree.

KILTY, Chancellor, (December term 1807.) The bill originally filed was by *Stewart* and wife, against *Mary Pottenger*, as executrix of *Robert Pottenger*, to which an amendment was made, making *John Gassaway* a party defendant. A cross bill was also filed by *M. Pottenger*, ex-

N. G., by his will dated in 1784, devised as follow. "I give and bequeath unto my son J G., and to the heirs of his body lawfully begotten, all my real estate, at the age of 21 years, provided he does not marry before he arrives to the age of 21 years; if he does, it is then my will that no part of my real estate shall be

delivered up to him till he arrives to the age of 25 years. And the profits arising on the said real estate during the term of five years, to be equally divided between my two daughters hereafter named. But if my said son J should die without lawful issue, I then give and bequeath unto my daughters M and S, and to the heirs of their bodies lawfully begotten, all my real estate, to be equally divided between them. It is also my will, that if my said daughters should marry before the age of 25 years, that then my said real estate shall be taken into the possession of my executors hereafter named, and not to be given to them till they arrive to the age of 25 years." He then bequeathed to his said two daughters all the money due him, upon bond, &c. to be equally divided between them when they arrive to the age of 21 years. And after the payment of his debts, he bequeathed to his said three children all the residue of his personal estate, to be delivered up to them when they arrived to the age of 21 years, to be equally divided amongst them; and appointed R P his sole executor, and died in 1791. J G, the son, arrived at the age of 21 years in December 1796, without having married. *Held*, that J G, the son, took an estate tail in *presenti* with a remainder in tail to the two daughters M and S, as tenants in common; and that the two daughters were not to have any of the profits of the real estate, only on the contingency of the son's marrying before 21.

M, under the age of 21 years, but above the age of 16, by power of attorney authorized J G to make a settlement with R P, of her portion of her father's real and personal estate. Such settlement was made, and the property delivered to, and a receipt given by, J G, on which settlement M became indebted to R P in £1250, for which sum J G gave his bond. On a bill filed in chancery by M and her husband, against the executrix of R P, to set aside the settlement so made, and to have an account of the said estate, the defendant pleaded and relied on the said settlement and payment to J G as a bar. *Held* that the settlement be annulled and set aside, and that the defendant, as executrix of R P, she having admitted assets, account with the complainants, &c.

In cases of intestacy, or there being no contrary direction by will, a female, above the age of 16, would be capable of authorising any person, by a common order, to receive her estate, by which she would be bound as far as any payment or delivery should be made. But it is not so clear that she would be bound by a settlement made by her agent, although specially authorised by her. *Per Kilty, Chan.*

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ecutrix as aforesaid, against *John Gassaway*, who answered both bills.

The object of the original bill is to set aside a settlement that was made by *John Gassaway*, of the profits of the estate real and personal of *Nicholas Gassaway*, deceased, due to *Mary Gassaway*, then a minor, under a power of attorney executed by her, and to have an account of the said estate, and payment of the sum found due. An account of the assets left by *R. Pottenger* is also prayed for. The defendant, *M. Pottenger*, in her answer, states the power of attorney given by *Mary Gassaway*, (now the complainant *Mary Steuart*;) to *John Gassaway*; the delivery by *R. Pottenger* to *John Gassaway* of the said *Mary's* share of her father's negroes, and other property, and his receipt for the same; a final settlement of her accounts before the register of wills of *Anne-Arundel* county, who had stated an account; and that the said *Mary* was indebted for education and maintenance in the sum of £617 9 9, for which *John Gassaway* gave his bond. And the defendant pleads and relies on the said statement and payment to *Gassaway*, as a bar to the claim; but admits a sufficiency of assets. It appears from the evidence exhibited, that *N. Gassaway* died on the 26th of May 1791, having duly executed his last will on the 19th of July 1784, of which he appointed *R. Pottenger* sole executor, who, as is admitted in the answer, took out letters testamentary thereon. That *R. Pottenger* took possession of the estate, and that he employed an overseer, who went there soon after, to wit, in June then next; but that neither *Pottenger*, nor any other person, was appointed as guardian. That the possession was held until December 1796, when *John Gassaway* became of age; and that the settlement above mentioned was made in November 1798, when the complainant, *Mary*, was a minor.

In cases of this kind it has been usual for the parties to consent to a decree to account, reserving all equity; but it is a course that is optional with them, and not being consented to by the parties, the most important question in the suit is now to be decided, to wit, Whether the complainants are entitled to an account, or whether the settlement which is pleaded and relied on, or any other circumstance, is a bar to their claim? Upon a full examination

of the subject, the chancellor is clearly of opinion, that the claim of the complainants is not barred by the defence set up, but that they are entitled to an account. The reason for which, and the manner in which it is to be taken, will be stated.

From the interrogatories in the bill, it will be perceived that an account is prayed of the personal estate of which *R. Pottenger* was the executor, and also of the profits of the real estate, for which he is properly charged as guardian, on the ground of his having entered upon the land, and received the profits. And it appears that he considered himself as guardian, and acted as such, by which it may be presumed that the choice of a guardian by the infants, or the appointment of one by the court, was prevented.

The objections to the settlement made in 1798 are, that *Mary Gassaway* being then a minor, was incapable of executing a valid power of attorney. That supposing she would otherwise have been of a sufficient age to receive her estate, (being above 16,) yet the directions contained in the will restrained her power until the age of 21. That the settlement was in itself erroneous and improper; and that supposing it to have been made by her in person, and after she attained the age of 21, yet if made immediately after, when the influence of her guardian might not have ceased, it would have been liable to be opened by this court.

The answer made by the defendant's counsel to the first objection, is grounded on the act of 1715, *ch. 89, s. 15*, which declares that female orphans shall be accounted of full age to receive their estates at the age of 16, or day of marriage, which shall first happen. Without deciding how far the general rule of law is altered by that act, the chancellor is of opinion, that in cases of intestacy, or their being no contrary direction by will, a female, above the age of 16, would be capable of authorising any person, by a common order, to receive her estate, by which she would be bound as far as any payment or delivery should be made. But it is not so clear that she would be bound by a settlement made by her agent, although (as in this case,) specially authorised by her. But the act of assembly ought not to be so construed, as to take away the power of limiting, by will, the time when such female shall receive her estate. The will in this case bequeaths to the two daughters all

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the money, to be equally divided between them at the age of 21. The residue of the personal estate is given to the three children, to be delivered up to them at the age of 21. And in the devise of the real estate to the daughters, in case of the death of *John*, it is directed, in case of their marrying before the age of 21, not to be given up to them until they arrive at the age of 25. This direction in the will was remarked on by the counsel, and the chancellor considers that it might form alone a sufficient objection to the settlement that was made. It is admitted by the defendant's counsel, that *Mary Gassaway* was not authorised, before 21, to demand or sue for a settlement, but it is urged that she might before that age receive her estate. But the chancellor is of opinion, that the settlement or payment at that time was in contravention of the will of the testator, and ought not to be countenanced by a court of equity.

In considering the third objection arising from the nature of the account itself, it will be necessary to take a view of the situation of the parties. The office of guardian is certainly an arduous one, but when undertaken, (more especially if without a regular appointment,) it ought to be performed not only with fidelity, but also with skill and attention, at least to a reasonable degree. By the will of *N. Gassaway*, *R. Pottenger* was appointed executor, but was not named as guardian. It appears, however, that he immediately took possession of the real estate—employed an overseer, and exercised every other act of temporary ownership; and although it is in evidence that sometime after he requested another person to take the management in his place, it does not appear that he ever applied to the court to be appointed guardian.

If this reasonable and obvious step had been taken, the laws would have pointed out his course. Neither the act of 1715, *ch.* 39, or that of 1785, *ch.* 80, would have justified his expending, in the maintenance or education of the orphans, sums so entirely unproportioned to the profits of the estate; and the difficulties would have been lessened by making annual settlements in the orphans court, as the latter act directs. The same act provides also, that in case the produce of the estate is not sufficient to maintain and educate the minor, a part of the principal of

the personal estate may be applied by order of the orphans court.

The chancellor has not been able to discover from the evidence, or from the statements made in the course of the argument, the precise grounds of the settlement, so as to leave due to *R. Pottenger* the sum of £617 9 9, for which he took *J. Gassaway's* bond, nor the particular articles of the estate, (besides the slaves,) which were delivered up; nor does it appear to him with certainty whether the sums, credited in the paper written by the register of wills, were taken into the account. But on taking from the amount of the charges, to wit, £820 7 7, the several sums credited, independent of the £77 17 10 for interest received on certificates, the sum due would be only £515 5 10, supposing the personal estate, (being £748 5 3,) to have been paid over to her, and admitting the £125 to be the whole amount of her share of *R. Pottenger's* bond due to the testator. The result of the settlement, and of the bond given in her behalf, was that she had only her share of the personal estate, without having received any profit from the real estate, but on the contrary charged with upwards of £21 for its support, and charged with the principal and interest of the sums expended for her maintenance, for which no aid had been drawn from the interest of her estate.

The chancellor has considered the several items contained in the account marked *B*.

The first credit arising from the settlement made by the orphans court, will not be remarked on at present. On the debit side there is, (in addition to other sums for clothing and advances of money,) a charge of £335 5 3, paid for board, &c. in *Baltimore*, to the 21st of March 1794, and a charge of £108 1 7, for interest thereon.

With respect to the principal sum, it may be a question how far a guardian is to be protected where such expenditures were made for the advantage of the infant, and how far she ought to be answerable for them.

In regard to the propriety or legality of charging any interest on those sums, it is to be observed, (in addition to other objections,) that although possession was taken of the personal as well as of the real estate in 1791, and the inventory was taken in December in the same year, the final settlement with the orphans court, and the sale of the fur-

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niture and stock, did not take place until the year 1798, and the settlement was made without any charge of interest against the executor. It was the duty of the executor, when the debts were paid, within the time prescribed by law, to pay over or to retain, as guardian, the balance, which if properly applied would have prevented the accumulation of charges against the infants. Among the charges there is one of £43 1 2, paid to *J G* for board, which according to his testimony was not paid in money, but was discounted out of a debt due to the estate.

The other charges, (and in the chancellor's opinion the most exceptionable,) consist of sums expended for the use of the plantation, which exceed the amount of the profits. Whatever may be the result of the testimony of *J S*, and the other witnesses, as to the value of the land and stock, and whatever may be the degree of care and diligence which the law requires from a guardian or receiver, the chancellor cannot doubt of the power and justice of opening a settlement by which the heirs, who were entitled to the profits of the real estate till the devisee arrived of age, should be brought in debt by the way in which it was managed.

The receipt given by *J. Gassaway* on the 17th of November 1798, is so general in its terms, that no knowledge can be derived from it of what was actually paid or delivered; but it is for the full part and proportion of the estate devised to *Mary Gassaway*, under the will of *N. Gassaway*. Some information is, however, given by the answer of *J. Gassaway*. He admits the receipt of certain bonds in the manner stated in his answer. He admits that he is responsible for one third of the proceeds of the final sale of the effects of *N. Gassaway*, and the half of certain certificates, but he states, that no part of the complainant's claim has been paid, except the negroes. For them, and for the proportional share of the personal property sold on the 26th of April 1798, a receipt was given by him on the 30th.

The principle stated in the fourth objection is recognized in *Hicks vs. Hicks*, 3 *Atk.* 274, and in other authorities; and if the acts of persons, immediately after arriving at the age of 21, are entitled to the favourable interposition of a court of equity, the reasons for it must be much

stronger, where, under a construction of an act of assembly which is at least doubtful, an infant under that age, although past 16, is suffered to make a settlement by herself or by means of a power of attorney executed under the same disadvantages, and in contradiction as to time to the will of the testator.

The chancellor is therefore of opinion, that the settlement made by *J. Gassaway*, on behalf of *Mary*, the complainant, with *R. Pottenger*, ought to be set aside; and that the defendant, his executrix, having admitted assets, ought to account with the complainants according to the prayer of their bill. With respect to the manner of taking the account, it will be observed, that the complainants have stated that they did not relinquish any part of their claim against the defendant. And in the cross bill by *M. Pottenger*, as executrix of *R. Pottenger*, against *J. Gassaway*, she prays that he may be decreed to pay any sum which may be decreed to the complainants from her. In order, therefore, to enable the court to decree in either way, it seems proper that an account should be stated, crediting the defendant with such sums as *J. Gassaway* may be liable for; and that another should be stated without such credits.—Decreed accordingly—and as to the cross bill by *M. Pottenger* against *J. Gassaway*, the same is reserved for the decision of this court.

Several reports and statements were made by the auditor, to which there were various objections made by the complainants, and by the defendant, *M. Pottenger*.

KILTY, Chancellor, (September term 1809.) In the decree at December term 1807, the chancellor expressed his opinion that the settlement made by *J. Gassaway*, on behalf of *Mary* the complainant, with *R. Pottenger*, ought to be set aside, and with that view the several accounts were ordered to be taken; and as to this part of the first suit—Decreed, that the said settlement be annulled and set aside.

The items contained in that settlement will nevertheless be considered, as far as they are or ought to be included in the present accounts.

The next point to be considered, is the manner of ap-

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portioning the relief to which the complainants may be entitled against the several defendants.

It is to be observed, that although the complainants prayed leave to amend their bill by making *J. Gassaway* a defendant, they stated in their petition that they did not conceive it necessary, and an agreement was signed by the counsel for the defendant, *M. Pottenger*, that it should not operate to the prejudice of the complainant's claim against her; and, from the exceptions filed by them, it appears that they object to any credit being given to the defendant, *M. Pottenger*, on account of property delivered, or payments made, to *J. Gassaway*. If this point rested solely on the validity of the power of attorney to *J. Gossaway*, the chancellor is inclined to the opinion that he could not be made a party to the cross bill, so as to exonerate the executrix of *R. Pottenger*; but inasmuch as the delivery of the property to *J. Gassaway* has been in some degree acquiesced in by the complainant, *Stewart*, and a part thereof, to wit, his share of the negroes has been actually received by him, it is considered just, and within the power of this court, on the whole proceedings, more especially as the complainant was not obliged to file the amended bill, to credit the estate of *R. Pottenger* with such sums as *J. Gassaway* may appear to have received from him, and to charge *J. Gassaway* therewith, and with such other sums as he may be found liable for—which he states himself willing to account for, and which it is proved he has sufficient funds to pay; and in this way a circuitry of remedies is avoided.

The accounts which the auditor has deemed it necessary to state, together with those which were directed by the counsel for the parties, and by the complainant himself, are so numerous as to render the subjects of them very complicated, and the examination extremely difficult and laborious.

Upon a full investigation of these accounts, with the reports of the auditor, and exceptions thereto, (which are also numerous,) the chancellor is not satisfied that any of them ought to be confirmed, so as to be made the basis of his decree, without deciding on each particular exception. The objections to the several statements will be incidentally noticed in stating the principles which it is thought proper to adopt in the settlement, and the additional ac-

counts which it has been found necessary to have stated.

It will not be necessary to repeat the observations which were made in the interlocutory decree; but the chancellor is still of opinion, that under all circumstances *R. Pottenger*, considered in the light of a guardian, was answerable for what might, by reasonable attention and diligence, have been annually produced by the estate; and from the evidence he considers that he ought to be charged with the sum of £300, as the annual value of the land, negroes, stock and plantation utensils. [The chancellor then takes up the several items, &c. in the accounts, making various observations thereon, and amongst others the following:] The next charge is one-third of the balance of the personal estate, according to the final account passed by the orphans court, which, notwithstanding the uncertainty above mentioned respecting the allowance for the corn, and some other doubtful items, the chancellor has not thought it proper to depart from.

By these accounts there appears to be a balance due to the complainants from the defendant, *M. Pottenger*, as executor of *R. Pottenger*, of £913 14 3, up to the 1st of February 1808, which will be the ground of the decree in this part of the case. And it is to be observed, that whatever sums *R. Pottenger* was answerable for as executor, he became also, (as far as the balance remained,) answerable for as guardian; and that it is only for the sake of perspicuity that the accounts are stated against him in those different capacities.

By the same account *J. Gassaway* is made debtor to the complainants in the sum of £1249 5 3, being the aggregate of the credits given to *R. Pottenger* for articles delivered to *J. Gassaway*. Another account was directed to be stated between *J. Gassaway* and the complainants, charging him with, &c. by which the balance due from him to the 1st of February 1808, including interest, &c. amounts to £1413 14 3.

The cross bill prays that *J. Gassaway* may be decreed to pay any sum which may be decreed to the complainants from the executrix of *R. Pottenger*; but this cannot be extended further than to the sums for which he (*Gassaway*,) is justly answerable, and which so far lessen the amount that *R. Pottenger's* estate would otherwise be liable

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for. Nor can the condition of the bond of indemnity from *J. Gassaway* to *R. Pottenger*, be construed to give validity to the settlement made, or to enforce it against *Gassaway*, when it has been annulled as against the complainants.

The object of this bill appears to have been misapprehended by the defendant, *Gassaway*, in the first part of his answer, which relates to his own bond dated in November 1798, but in the sequel of the answer the bond and mortgage from him to *R. Pottenger*, referred to in the bill, are omitted. The bonds and mortgage cannot be cancelled, as is prayed by the defendant, *Gassaway*, because his own bond, and that given by *A. White*, (who married the other sister,) have no relation to the present suits, and because the decree to be made against him will be on the bill, as amended, and the cross bill, and will involve a decision upon the extent of the obligation arising from his bond of indemnity on account of the complainant, *Mary*.

There is another part of the case which it is necessary to determine on, viz. Whether under the prayer for general relief in the cross bill, and under the prayer of the amended bill, a sale of the property mortgaged by *J. Gassaway* to *R. Pottenger*, ought to be decreed, in order to raise the sum found to be due from *J. Gassaway*? The chancellor is of opinion, that the complainants are entitled, in the first place, to the benefit of the mortgage which was taken by *R. Pottenger* as a further security on the bond given by *J. Gassaway*, on the delivery of the property of his sister *Mary* to him, notwithstanding that the mortgage was taken also to secure other claims.

According to the usual course of proceeding in decrees on accounts in this court, the sums due from the defendants respectively, on the 1st of February 1808, although they are the aggregate of principal and interest, will bear interest from that day. *Decreed*, that the defendant *M. Pottenger*, executrix of *R. Pottenger*, do pay to the complainants, or bring into this court to be paid to them, £913 14 3 current money, with interest thereon from the 1st of February 1808, until the same be paid, &c. *Decreed* also, that unless the defendant, *J. Gassaway*, shall on or before the 26th of March 1810, pay to the complainants or bring in, &c. the sum of £1413 14 3 current money, with interest from the 1st of February 1808, until paid, &c. the tracts of land in the

proceedings mentioned, which were conveyed by the said *J. Gassaway* to the said *R. Pottenger*, by deed of mortgage dated the 8th of January 1800, or such part of the said tracts, or either of them, as may be sufficient, shall be sold. That ——— be and he is hereby appointed trustee for the purpose of making the said sale, &c. *Decreed* also, that the parties respectively pay their own costs. From this decree the defendants appealed to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, and EARLE, J.

*Pinkney*, (Attorney-General U. S.) *Shaaff* and *T. Buchanan*, for the Appellant, *A. Pottenger*, referred to the will of *N. Gassaway*, mentioned and set out in the record, dated the 19th of July 1784, wherein, amongst others, are the following devises, viz. "*Imprimis*. I give and bequeath unto my loving son *John Gassaway*, and to the heirs of his body lawfully begotten, all my real estate, at the age of twenty-one years, provided he does not marry before he arrives to the age of twenty-one years; if he does, it is then my will, that no part of my real estate shall be delivered up to him till he arrives to the age of twenty-five years. And the profits arising on the said real estate, during the term of five years, to be equally divided between my two daughters hereafter named. But if my said loving son, *John Gassaway*, should die without lawful issue, I then give and bequeath unto my loving daughter, *Mary Gassaway*, and my loving daughter, *Sarah Cotter Gassaway*, and to the heirs of their bodies lawfully begotten, all my real estate, to be equally divided between them. It is also my will, that if my said loving daughters should marry before the age of twenty-one years, that then my said real estate shall be taken into the possession of my executors hereafter named, and not to be given to them till they arrive to the age of twenty-five years." "*Item*. I also give and bequeath unto my said two loving daughters, all the money that should be due me at the time of my death, either upon bond, note, certificate, or open accounts, including the interest thereon, to be equally divided between them when they arrive to the age of twenty-one years. And after the payment of all my just debts, I give and bequeath unto my said three loving children, all the residue of my personal estate, to be delivered up to them when

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they arrive to the age of twenty-one years, to be equally divided amongst them." He then appointed Doctor Robert Pottenger his sole executor. The testator died in 1791. His son, John Gassaway, was born on the 12th of December 1775. His daughter Mary, (one of the complainants,) was born on the 4th of January 1779; and his other daughter, Sarah Cotter, was born on the 6th of October 1780. They stated, that the first question was, Who was to receive the profits of the estate? J. Gassaway arrived at the age of 21 years on the 12th of December 1796, without having married. The chancellor, by his decree, does not state what portion of the estate the daughters were entitled to. They were not entitled to the profits of the estate upon J. Gassaway's arriving to the age of 21 years, unmarried, as it cannot be presumed the testator intended that his son should have no part of the rents and profits until he arrived to the age of 25. He was the first object of the testator's bounty, and it cannot be supposed he was left unprovided for until he attained the age of 25. The devise to J. Gassaway must operate as a devise *in presenti*, and in no other way; and if so, he was entitled to the profits during his minority. If he married before 21, then the profits, after that time, and until he arrived to the age of 25, would go to the daughters. The profits were to be separated from the estate only on the son's marrying, when the daughters were to come in for those arising between the time of the son's marriage and his arrival to the age of 25. It is clear from the will, and the intention of the testator, that the profits should go to the son unless he married before 21, and if he did, he was then to be debarred of them until he arrived to 25 years of age. They referred to *Doe vs. Lea*, 3 T. R. 41. *Heath vs. Perry*, 3 Atk. 102; and *Thomas vs. Woolton*, 4 Harr. & M Hen. 428.

2. That under the act of 1715, ch. 39, females were accounted of age at 16, or day of marriage, for the purpose of receiving their estate; and although, under the will, the daughters of N. Gassaway could not at the age of 16 demand their property, yet it did not prevent their estate being delivered to them at that age.

Harper and Magruder, for the Appellees, contended,  
1. That the power of attorney executed by Mary, one of

the appellees, before the age of 21, was null and void; that the act of 1715, *ch.* 39, makes females of age at 16, to enable them to receive their estate, but for no other purpose. They referred to *Low vs. Gist*, 5 *Harr. & Johns.* 106, (*note.*)

2. That a guardian shall not be allowed for any sum of money beyond the amount of his ward's estate for her education and maintenance. They referred to the act of 1785, *ch.* 80. *Chaplin vs. Chaplin*, 3 *P. Wms.* 365; and *The Attorney-General vs. Syderfh*, 1 *Vernon*, 225.

3. That the devise to *J. Gassaway* was an executory devise; and that until his arrival to the age of 25, the profits of the estate were to be equally divided amongst all the children claiming as heirs of the testator. They referred to 2 *Fearne*, 18, 24, 25. *Clarke vs. Smith*, 1 *Lutw.* 798.

CHASE, Ch. J. delivered the opinion of the court. It is the manifest intention of the testator that *John Gassaway* should take an estate in tail *in presenti*, with a remainder in tail to his two daughters, *Mary* and *Sarah*, as tenants in common. It is also his intention that his son should not marry before he attained the age of 21; and to secure a compliance with this prohibition to marry before 21, the testator imposes the penalty on him of loss of the profits for five years, and vests them in his daughters on the contingency of his marrying before 21. It certainly was not his intention to deprive his son of any of the profits of his real estate unless he did marry before he attained the age of 21, nor was it his intention the profits should vest in his daughters only on the contingency of his son's violating the prohibition.

The testator directs, in case his son should marry before 21, that no part of his real estate should be delivered up to him until he arrived to the age of 25 years. A similar restriction is imposed on his daughters. Such a construction is to be made of the will as will best effectuate the intention of the testator, if it does not contravene some rule or principle of law. It is very plain the testator did intend the son should not possess and manage his real estate before 21, and that he should not be deprived of the profits, unless he married before 21, for he vests them in the daughters only on that contingency, and then only for

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five years. If an estate tail vested in the son, possession to be delivered *in futuro* on his attaining the age of 21, did not the testator dispose of all his real estate, except the reversion after the remainder in tail to his daughters? If so, to whom did the profits belong but the son from the death of the testator until the son's attainment to the age of 21?

If any interest remained in the testator undisposed of, except the reversion, what was it; and could it be more than the profits from the death of the testator until his son should arrive at the age of 21? He certainly did not consider them as distinct from the estate devised to his son, and his only intention was, that his son should not take possession, and manage the estate, before he attained his age of 21. He has not made a particular disposition of the profits, and it is plain that he did not intend his daughters should have any of the profits of the real estate only on the contingency of the son's marrying before 21. That contingency never happened, and the daughters are not entitled to any part of the profits of the real estate. If the estate vested in the son, and would have descended to his issue in case of his marrying, dying, and leaving issue, before he attained the age of 21, the profits must attach to the immediate vested interest devised to the son, as an inseparable incident, there being no disposition of them by the testator; and this exposition corresponds with the apparent intention of the testator, as disclosed by the will, on considering it collectively, and is not in contravention of any rule or principle of law.

The court caused an account to be stated on principles adopted by them, viz. *Robert Pottenger*, as executor of *N. Cassaway*, was charged in account with the complainants with their proportion of the slaves, one half of *Robert Pottenger's* bond to the deceased, with interest thereon to the 1st of September 1791, and one third of the balance of other property, excluding bonds, &c. Upon the amount of these principal sums interest was charged to the 1st of January 1793, and one fourth of the whole sum expended in maintenance, &c. was then deducted. Interest was charged on the balance then due to the 1st of January 1794, when a like deduction was made, and so in like manner to the 1st of January 1795, and 1st of January 1796. On the balance then due interest was charged to the 1st of Jan-

May 1797, when the value of the slaves delivered to *John Gassaway* was deducted. Interest was then charged on the balance due to the 17th of November 1798, as also one half of all sums of money received on bonds, &c. with interest charged on the said several sums so received from the respective times, to the 17th of November 1798. A deduction was then made for property then delivered to *John Gassaway*. On the balance interest was charged to the 17th of January 1814, leaving a balance then due of \$1195 95. *Decreed*, that the decree of the court of chancery, so far as the same relates to the appellant, *M. Pottenger*, be reversed and annulled. *Decreed* also, that the appellant, *M. Pottenger*, executrix of *R. Pottenger*, bring into the court of chancery, to be paid to the appellees, or pay to them, the sum of \$1195 95, with interest thereon from this 17th of January 1814, until paid, &c. *Decreed* also, that each party pay their own costs incurred in this court and in the court of chancery. *Decreed* also, as to the residue of the said decree of the court of chancery, so far as the same relates to the appellant *J. Gassaway*, that the same be affirmed *nisi*, cause shown during this sitting of this court; and that if such cause be not shown, then the chancellor proceed to carry his said decree into full effect against the said *Gassaway*. *Decreed* also, that the chancellor pass all necessary orders or decrees for carrying this decree into full and complete effect against the said *M. Pottenger*, executor as aforesaid.

DECREE REVERSED.

MAYDWELL *et al.* Lessee vs. CARROLL.

DECEMBER.

APPEAL from Baltimore County Court. Ejectment brought by the appellant to recover a tract of land called *Merryman's Lot*, on separate demises of one fifth part by each of the lessors. The defendant, (now appellee,) took defence on warrant, and plots were returned.

1. At the trial, the plaintiff read in evidence a patent granted to *Charles Merryman* and *Nicholas Haile*, on the 6th of May 1689, for *Merryman's Lot*, containing 210 acres, more or less. It was admitted that *Merryman* and *Haile* divided the said tract of land between them, and that *Merryman* received all that part which lies to the N

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E of a line drawn on the plots, and *Haile* received all that part which lies to the S W of the same line, (this latter part being the land in controversy,) and that they took possession of their said respective parts. The plaintiff also gave in evidence, that *Nicholas Haile* died in 1730, having made his last will and testament, devising his said part of *Merryman's Lot*. [See the devises set out in the case of *Carroll's Lessee vs. Maydwell et al. ante* 292.] The plaintiff further gave in evidence, that *Frances Haile*, the devisee for life, and *Neale Haile*, the devisee in remainder, of said part of *Merryman's Lot*, lived together thereon until about the year 1740. That a certain *Benjamin Long* purchased of a certain *William Worthington* a tract of land called *The Forrest*, in fee simple, and that *Long* agreed to let *William Carter* have one half of the said land, upon his paying the sum of ten pounds sterling, which said sum of money he accordingly paid, and himself and *Long* entered upon and were possessed of said tract of land, before and in the year 1740, but obtained no deed or conveyance for it at that time. That *Neale Haile* and *William Carter*, being so possessed and entitled to the said parts of the tracts of land called *Merryman's Lot* and *The Forrest*, did, by parol agreement, mutually exchange said parts of said tracts of land, and in pursuance of said exchange, in the year 1740, *Neale Haile* removed to and took possession of *Carter's* part of *The Forrest*, and continued in the undisturbed and peaceable possession of it until his death in the year 1796, and also devised the same, by his last will and testament, and that his devisee continues to this day in the undisturbed and peaceable enjoyment and possession thereof; and that *Carter* removed to and took possession of *Neale Haile's* part of *Merryman's Lot*, in conjunction with *Frances Haile*, by her permission and consent, to whose daughter he had been and then was married, and lived in the same house with *Frances Haile*, the devisee for life of *Nicholas Haile*, during the winter of the year 1740, and in the spring he built himself a house on it, and began to clear and cultivate the same, and continued in the undisturbed possession of it from that time until the year 1778, with the approbation and consent of *Frances Haile*, the tenant for life, when he removed away, and *Joseph Ensor*, under a contract of purchase from *Carter*, entered in possession of the place. That *Ensor*, if he ever

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paid any part of the consideration which was to have been paid to *Carter* for the said land, altogether failed to pay a considerable part thereof; and that about the time of the death of *Ensor*, which happened about the year 1779 or 1780, *Carter* returned and took possession of said land again; and that *Carter* never gave any deed or conveyance for the said land to *Ensor*; and that *Carter*, and those claiming under him, were from thenceforth in the peaceable possession of the said lands, until they were ejected therefrom by *David M Mechen* and *Elijah Merryman*, acting as trustees of *Joseph Ensor*, a lunatic, and son of the said *Joseph Ensor*, deceased. That *Carter* died in 1782, having by his will, dated the 21st of December 1781, devised the said part of *Merryman's Lot* to *James Maydwell*, who married his daughter *Temperance*. This devise was as follows: "*Item*. Now whereas I was possessed of a tract of land, being part of *Merryman's Lot* and part of *Haile's Addition*, as expressed by *Nicholas Haile's* will, which land was willed by the said *Nicholas Haile* to his son *Neale*, for which I changed another tract in the Forest, and made the said *Neale* a lawful right, and he now refuses to make me a right. Now I do hereby give unto my son-in-law, *James Maydwell*, full and ample authority to sue for the same, to all intents and purposes, as I could do myself if I was in being and there present; and if he recovers the same, it is my will and desire, that my dear and well beloved wife *Anne*, shall have her living in or on it during her life, provided she dies a widow, but in case she marries again, then she shall quit all claim or privilege thereto, and the right to descend to, and become the right of my said son-in-law, the husband of my daughter *Temperance*, and their heirs, for ever; and in like manner after her decease if she dies a widow." That *Temperance* and *James* died before the institution of this suit, intestate, leaving the lessors of the plaintiff their only children and heirs. That at the time of the exchange between *Neale Haile* and *William Carter*, the said *Neale Haile* gave his bond of conveyance to *Carter*, for the conveyance of said part of *Merryman's Lot*, in pursuance of said exchange, which bond was not now in possession of the plaintiff, and was proved to have been lost. That *William Worthington*, in pursuance of said exchange, by deed of bargain and sale regularly executed on the 10th of September 1741, conveyed all the said land called *The Forrest*

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to *Neale Haile* and *Benjamin Long*, containing 200 acres, for the consideration of £18 sterling money. That the share or interest of *Benjamin Long* in *The Forrest*, came by regular and legal conveyance from said *Long* to *Joseph Taylor*; and that *Carter* and *Long* held each one half of that tract, as in severalty, before the exchange between *Haile* and *Carter*; and that after *Haile* made said exchange, and took possession of his part of *The Forrest* in pursuance of the exchange, he and *Long* held each one half said tract in severalty, until *Long* sold and conveyed his part thereof, and the same came as aforesaid to *Joseph Taylor*; and that *Taylor* and *Haile* thereupon did, by deed regularly executed, acknowledged and recorded, confirm said division, and holding in severalty, and divided thereby the said land between themselves, in pursuance of and according to said holding. That although *Joseph Ensor*, the father, died possessed of considerable property real and personal, yet the same was greatly insufficient to pay his debts, and that *Carter*, nor his representatives, have ever been paid the balance remaining due as aforesaid for the purchase of said land, from *Joseph Ensor*, or any other person; and that *Frances Haile*, the tenant for life, died some time in the year 1774. The defendant then read in evidence, by consent, the depositions of *Benjamin Long* and *George Chiles*. [See them set forth in the before mentioned case of *Carroll's Lessee vs. Maydwell et al. ante 292.*] He also gave in evidence an indenture, executed on the 11th of April 1771, by *Neale Haile*, with a certain *William Cooke*, to the said *Joseph Ensor*, of and concerning the said land called *Merryman's Lot*; and also a common recovery, suffered by said *Neale Haile*, to said *Joseph Ensor*, of and concerning the said land, with a writ of seizin thereon, and the return of the said writ; and that the said indenture was made, and common recovery suffered, with the knowledge and consent of the said *William Carter*, and in pursuance of the permission given by him for that purpose, as stated in the said deposition of said *Chiles*. [See the deed and common recovery in *Carroll's Lessee vs. Maydwell, et al. ante 292.*] That in or about the year 1779, *Joseph Ensor* died, leaving a very considerable real estate, and also leaving an infant son, *Joseph Ensor*, his heir at law, who was an ideot, and a daughter, *Mary Ensor*; and that after the death of *Joseph Ensor*, the father, and dur-

ing the infancy of *Joseph Ensor*, the son, *William Carter*, alleging that seventy pounds, part of the sum agreed to be paid to him by *Joseph Ensor*, the father, for his right to part of *Merryman's Lot*, still remained due and unpaid, re-entered into the said land, and possessed himself thereof, and died so possessed, having first made his will, as stated and proved by the plaintiff. He also gave in evidence an act of assembly appointing *Elijah Merryman* and *David M. Mechen* trustees of the person and estate of the said *Joseph Ensor*, the infant, passed at May session 1783. And that after the passing of the said act, and the death of *William Carter*, and during the life of *Joseph Ensor*, the infant, *Merryman* and *M. Mechen*, under the authority in the said act contained, brought an action of ejectment in the general court against *James Maydwell*, then in possession of the said part of *Merryman's Lot*, under the will of *William Carter*, to recover from him the said land, in which action the aforesaid deposition of *Benjamin Long* was taken on the part of the defendant, and filed in the cause; and there was a verdict for the plaintiff in May term 1789, a writ of possession issued to October term 1790, and possession thereof duly delivered to *Merryman* and *M. Mechen*, on the 18th of September 1790. He also gave in evidence a deed of mortgage from the said *Ensor*, the father, to *Charles Carroll*, of *Carrollton*, duly executed, acknowledged and recorded, dated 27th of June 1771, for, amongst other land, 105 acres of land, lately the dwelling plantation of *Nicholas Haile*, deceased, being part of a tract or parcel of land called *Merryman's Lot*; also 30 acres, being part of *Haile's Addition*, &c. redeemable on payment of £676 19 9 sterling money, on the 30th of June 1777. Also a deed from *Neale Haile* to *Merryman* and *M. Mechen*, dated the 5th of September 1789, for *Merryman's Lot*, and *Addition*, commonly called *Haile's Addition*, stating the conveyance from *Haile* to *Joseph Ensor* in the year 1771, in which conveyance it is stated there were defects, &c. He also gave in evidence, that after the said possession, *Merryman* and *M. Mechen* conveyed the said land to *Charles Carroll*, of *Carrollton*, by deed duly executed, acknowledged and recorded, dated the 1st of May 1794—consideration, in part payment of his mortgage, and of 5 shillings, &c. And that the said land, through various conveyances, passed from the said *C. Carroll*, of *Car-*

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*rollton*, to the defendant, in or about the year 1801, who, since that time, and before the institution of this suit, made improvements thereon to the value of \$40,000, and upwards; and that *James Maydwell*, in his life-time, and the lessors of the plaintiff before and since his death, resided in the neighbourhood of the said land, and were fully apprised of the said improvements. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if they believed the matters so offered in evidence by the plaintiff, that then he had made title to the land mentioned in the declaration, and was entitled to recover, although they may also believe the evidence of the defendant; and that if a deed was necessary from *Neale Haile* to *William Carter*, to perfect *Carter's* title to the said part of *Merryman's Lot*, that the jury might and ought to presume that such deed was regularly and duly made. This direction the Court, [*Nicholson*, Ch. J.] refused to give. The plaintiff excepted.

2. The plaintiff then gave in evidence, that after *Ensor's* death, *Carter*, and those who claim under him, were in the peaceable and quiet possession for ten years, of the land for which this suit was brought. The defendant then gave in evidence, that the possession of *Carter*, and those claiming under him, was during the infancy of *Joseph Ensor*, the son, and was terminated by the recovery in ejectment by *Merryman* and *M. Mcchen*, and the obtaining of possession under the same. The plaintiff then prayed the court to direct the jury, that he was entitled to recover the said land against the defendant, unless he the defendant can show a good title to the same. But the court refused to give the direction. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, and JOHNSON, J. by

*Martin*, for the Appellant; and by  
*Harper*, for the Appellee.

CHASE, Ch. J. delivered the opinion of the court, stating, that in the case of *Carroll's Lessee vs. Maydwell, et al.* (*ante* 292,) which was very fully argued by the counsel concerned, the court had formed an opinion on the question as

to the exchange of the lands, and which was, that such an exchange cannot be proved by parol evidence, and they were therefore of opinion, in this case, that the appellant had not made title to the land in dispute. The court consequently concurred in the opinions declared by the court below in each of the bills of exceptions.

JUDGMENT AFFIRMED.

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KENNEDY VS. THE BALTIMORE INSURANCE COMPANY.

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APPEAL from *Baltimore County Court. Assumpsit.* The declaration contained a count for money had and received, and the other money counts. The general issue was pleaded. At the trial the plaintiff, (the appellant,) gave in evidence, that he was the owner of the ship called *The Arctusa*, which he had caused to be insured by the defendants (the appellees,) on a voyage from the Island of *St. Domingo* to the port of *Baltimore*; and that in the prosecution of the voyage, the ship was captured by a *British* vessel of war, and carried into the Island of *Bermuda*, where on her arrival she was, together with her cargo, libelled in the vice admiralty court there established, as prize of war. That further proceedings thereon took place, until the sentence of the said court was pronounced, which liberated the vessel, but condemned the cargo as lawful prize. That an appeal was interposed from the said sentence to the high court of appeals in *Great Britain*, by the captors, so far as regarded the restoration of the vessel, and on behalf of the claimants of the cargo, so far as the said sentence regarded the condemnation of the cargo. That the said appeals were regularly prosecuted before the said high court of appeals, and the sentence, in relation of the vessel, was affirmed, and freight ordered to be paid by the claimants of the cargo; and that the sentence of condemnation of the cargo was reversed, and the same order ed to be restored to the claimants. That *Anthony Man- gin* of the city of *London*, merchant, acted as the agent of the defendants, in attending to the prosecution of appeals before the high court of appeals in *England*, and in receiv-

K the owner of a vessel, caused her to be insured by B and C, on a voyage from S to L.—In the prosecution of her voyage she was captured and carried into a *British* port, where the cargo was condemned, but the vessel was liberated. On an appeal the sentence in relation to the vessel, was affirmed, and freight ordered to be paid by the claimants of the cargo; and the sentence of condemnation of the cargo was reversed, and the cargo ordered to be restored to the claimants. D, the agent of B and C, received from the claimants of the cargo the amount of the freight awarded. Immediately after the capture, K abandoned the vessel to B and C, and claimed as for a total loss, which was paid to him. He also claimed the amount of the freight received by the agent of B and C; and in an action of *assumpsit* for money had and received, brought by him against B and C, being a *corporate body*—*Uch*, that the action can be maintained, and that K is entitled to all freight earned to the time of the capture; that the freight, before and after the cap-

ture, is susceptible of apportionment, so as to give to each of the parties the usufruct of the ship during the time of their respective ownership.

In general a corporate body cannot act but by its seal; but that doctrine cannot be extended so far as to prevent their liability from the nature of their institution, or for acts done necessarily or incidentally arising from an authority delegated to their agent.

The action for money had and received is an equitable action, and the plaintiff, in support of it, can resort to and prove all equitable circumstances incident to his case; and where money was received by an agent of a corporation, an assumption in law was created by the corporation in receiving the money through their agent.

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ing whatever sums of money might be awarded to them in virtue of the decrees or orders of the said court. That the said *Mangin* received from the claimants of the said cargo the sum of £1230, sterling money, being the amount of freight awarded in manner aforesaid. He further gave in evidence; that immediately after hearing of the capture of the ship *Arethusa*, he abandoned the said ship to the defendants, and claimed as for a total loss, and was paid accordingly. The defendants then moved the court to direct the jury, that the plaintiff under this evidence could not maintain an action of *indebitatus assumpsit* against the defendants as a corporation. This direction the court, [*Nicholson*, Ch. J.] gave. The plaintiff excepted; and the verdict and judgment being for the defendants, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, and JOHNSON, J.

*Harper*, for the Appellant, contended, 1. That a corporation could be sued in an action of *assumpsit*. 2. That an abandonment of the vessel insured, was not an abandonment of the freight.

On the *first point* he cited *The Bank of Columbia vs. Patterson's Adm'r*. 7 *Cranch*, 299; and *Caze & Richaud vs. The Baltimore Insurance Company*, *Ibid* 358.

On the *second point*—*Marsh*. 604; and *The United Insurance Company vs. Lenox*, 1 *Johns. Ca.* 377.

*W. Dorsey*, for the Appellees, contended, 1. That an action of *indebitatus assumpsit* would not lie against a corporate body. 2. That upon the prayer made to the court below, the plaintiff had no right to complain of the direction given to the jury. 3. That if the defendants had received the money, they had a right to retain it.

On the *first point*, he insisted that the action would not lie, because the money was not received by the defendants; and that even if it had been so received, the action could not be maintained, because, if wrongfully received, it was not within the scope of the act of incorporation of 1795, *ch.* 59. That the company had no authority to receive money belonging to third persons; and for money wrongfully received the corporation was not liable. He referred to 1 *Blk. Com.* 502. 1 *Bac. Ab.* tit. *Corporations*. 6 *Bac. Ab.* (*Kidd's Suppl.*) 267. *Taylor vs. Dulwick Hospital*,

1 P. Wms. 656, 657. *Breckbill vs Turnpike Company*, 3 Dall. Rep. 496; and 1 Chitty's Plead. 97.

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On the third point, he cited 2 Marsh. 601, 602, 604, 620, (note.) *Thompson vs. Rowcroft*, 4 East, 34. *Leatham vs. Terry*, 3 Bos. & Pull. 479. *McCarthy vs. Abel*, 5 East, 388. *Park*, 227. *United Insurance Company vs. Lenox*, 1 Johns. Ca. 377.

CHASE, Ch. J. delivered the opinion of the court. The question to be decided in this case by the court is, Whether an action for money had and received can be maintained by the appellant against the appellees, for money had and received by their agent for freight received for goods shipped in *The Arethusa*, from the complainants?

In determining this question, the court are necessarily drawn into a consideration of the right the appellant has to the freight, and the extent of that right on the facts stated. What effect has the abandonment of the ship for a total loss produced? According to the opinion of the court, the abandonment of the ship for a total loss on account of the capture, did, by operation of law, transfer all the right and interest of the appellant in the ship to the appellees, on their acceptance of the abandonment, and all the benefits and advantages, directly or incidentally accruing from the ship subsequent to the capture.

The abandonment for a total loss has a retrospective relation to the cause of the abandonment, and in this case, to the capture of the ship. At that time all the right and interest of the appellant, the insured, in the ship ceased, and the right and interest of the insurers commenced. The assured, by his abandonment, had made his election to take that which was substituted by mutual consent as an equivalent for the ship, and the insurers, by their acceptance, gave their assent to it. What were the respective rights of the assured and insurers at this time as to the freight of the ship? If the freight is susceptible of apportionment, and in our judgment it is, and may be apportioned in such manner as will do justice to both parties, by giving to each the usufruct of the ship during the time of their respective ownership—the proportion of each in this case, to be ascertained according to existing circumstances. The principle of apportionment in this case, and those similarly circumstanced, is founded in equity. The

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contingency which produced the abandonment cannot be attributed to either party, and the result ought not to be more unfavourable to one than the other. But if this principle is rejected on the ground that there is no criterion by which the apportionment can be made, then the insurers would not be burthened with the loss against which they insured; but by receiving the whole of the freight might be compensated for it, or at any rate their loss would be very much diminished at the expense of the assured.

The court are of opinion, that the appellant is entitled to all the emoluments or earnings of the ship anterior to the capture, to be adjusted by a jury on such evidence as is legally admissible before them.

The position is not to be controverted, that generally a corporate body cannot act but by its seal; but this position cannot be extended so far as to prevent their liability from the nature of their institution, or for acts done, necessarily or incidentally arising from an authority delegated by such body to their agent legally appointed. If it was otherwise, and the agent did acts, or received money, within the scope of the delegated authority, and became insolvent, the party transacting business with them would be without remedy in law or equity.

In this case it is stated, that *Anthony Mangin* acted as the agent of the appellees in attending to the prosecution of the appeals in *England*, and in receiving money awarded to them in virtue of orders or decrees of the high court of appeals; and it is also stated, that *Mangin* received £1230 sterling money for freight in this case.

The action for money had and received is an equitable action, and the plaintiff, in support of it, can resort to and prove all equitable circumstances incident to his case. And the court are of opinion, that an assumption in law was created by the appellees in receiving the money through the agency of *Mangin*; and that the appellant is entitled to all the earnings and emoluments of the ship which had accrued prior to the capture.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

LAWRENCE *et ux*, Lessee vs. HEISTER *et al*.

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APPEAL from *Washington County Court*. Ejectment by the appellant to recover the following tracts of land: *Addition to Hagar's Delight, New Work, The Resurvey on New Work, Rohrer's Fancy, Hagar's Fancy, Great Hall, Found it Out, and The Resurvey on Dawson's Strife*, all lying in the county of *Washington*. The general issue was pleaded. It was admitted upon the trial that *Jonathan Hager*, the elder, was seized in fee of the lands in dispute, and being so seized, died in 1775, intestate, leaving two children only, to wit, *Jonathan Hager*, the younger, his heir at law, and *Rosannah*, a daughter, who in his life time married *Daniel Heister*, the younger, in the year 1771. That at November session 1781, *ch. 3*, the legislature of this state passed a law "for vesting an estate for life in *Daniel Heister*, the younger, and an estate in fee simple in *Rosannah*, his wife, in fourteen hundred acres of land lying in *Washington* county, and in five lots of land lying in *Elizabeth* town, in the said county." The preamble of this act recited, that "Whereas the said *Daniel Heister*, by his petition has represented to this general assembly, that *Jonathan Hager*, late of *Frederick* county, was brought to a sudden death by an accident, and died intestate, leaving one son and one daughter, (the wife of the petitioner,) whereby his real estate descended to his son *Jonathan Hager*, then an infant; that the said *Jonathan Hager*, in November 1775, being then above 19 years of age, by writing agreed to convey to his sister and the said *Daniel Heister*, and their heirs, the quantity of 1400 acres of land, and five lots of land lying in *Elizabeth* town, in *Washington* county, being part of his late father's estate; that the said *Jonathan Hager* afterwards, in July 1776, being then above 20 years of age, again agreed in writing to convey the same land and lots to his sister and the petitioner in fee, and immediately thereafter entered into the *American* service, and was taken prisoner in the month of August 1776, and was carried to *Halifax* in *Nova Scotia*; that in August 1777, the petitioner obtain-

Independent of the acts of assembly of 1715, *ch. 47*, 1752, *ch. 8*, and November 1766, *ch. 14*, there was no legal mode by which a *feme covert* could transfer her interest in land, but by common recovery or fine.

By the act of 1715 a *feme covert*, if she is named as grantor in a deed of bargain and sale, may be barred of her lands if she acknowledged the deed in the manner prescribed by that act, but the husband must also be a grantor in the deed.

The act of 1765 is more explicit than the act of 1715, and shows, that where the interest of the *feme covert* is to be conveyed or barred, she must join with her husband in the conveyance intended to pass her interest, and the conveyance must be acknowledged by the husband.

To pass the interest of the wife in her land, she and her husband must join in the deed as grantors, and it must be acknowledged by the husband.

D H, of the state of *Pennsylvania*, and R, his wife, by deed, signed, sealed and delivered by them, and dated the 10th of February 1782, conveyed to W H, certain lands in this state, of which R was seized in fee. It was acknowledged by them as their respective act and deed, on the 14th of February 1782, before a justice of the supreme court of the state of

*Pennsylvania*, who took and certified the privy acknowledgment of R, the wife of D H, in the mode prescribed by the laws of this state to which there was the certificate of the president of the supreme executive council of the state of *Pennsylvania*, under the seal of the state, that the person who took the acknowledgments was one of the justices of the supreme court of that state. The deed was duly recorded in the records of the county, in which the lands lie, on the 7th of May 1822; but it was not acknowledged by D H, except in the manner before stated—Held, that the deed was inoperative to pass the interest of R, in the lands therein mentioned, to W H, the grantee in the deed, the acknowledgment by D H, not being in the manner prescribed by law, the law not authorising the husband, though a non resident, to acknowledge a deed so as to pass lands in this state, before any officer or tribunal out of the state.

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ed leave of the board of war to go to *Halifax*, where the said *Jonathan Hager*, being then of age, in a private manner executed a deed expressing to convey to the said *Daniel Heister*, in fee simple, the said 1400 acres of land, and the five lots aforesaid; and also made and executed a power of attorney to him the said *Daniel Heister*, but which, from the particular circumstances the parties were in at the time, could not be done in every point of formality, nor the same be brought off so as to be recorded agreeable to the laws of this state; and which said deed, so executed by the said *Jonathan Hager*, the son, expressed to convey 1400 acres of land situate in *Conococheague* settlement, being part of the land lately owned by and in possession of *Jonathan Hager*, late of *Frederick* county, deceased, father of *Jonathan Hager*, party thereto, 500 acres of said 1400 acres, to be bounded as follows, &c. &c. and the said *Jonathan Hager*, the son, did also by his said deed direct the other 900 acres of land to be divided and laid off, as seven impartial men, or a majority of them, should think reasonable and just; and likewise therein nominated the said seven men to be *Joseph Sprigg*, &c. "and the said *Jonathan Hager*, the son, did also by the same deed express to convey a house and lot, late in the tenure of *Thomas Semmes*, two lots," &c. "And whereas the said *Joseph Sprigg*," &c. "in virtue of the said nomination and appointment, did afterwards, to wit, on the 5th of September 1778, lay off and divide the said 900 acres of land, and accordingly, on the day and year last aforesaid, did make and execute a deed of division or partition, describing the courses, &c. which said deed was afterwards recorded, &c. all which facts appearing," &c. "Be it therefore enacted, &c. That an estate in fee simple shall be and is hereby vested in the said *Rosannah Heister*, the wife of the said *Daniel Heister*, the younger, of and in the said 1400 acres of land, and the said lots of ground, houses and premises, with all," &c. "to have and to hold the same, and every part thereof, unto the said *Rosannah Heister*, and her heirs, according to the description and location thereof in this act, and the said deed of division or partition contained, with full power and authority to the said *Rosannah* to alien and convey the said premises," &c. "or any part thereof, in fee simple, or otherwise, in as full and ample manner as any other *feme covert* may or can convey any real property by the laws of this state. Provided al-

ways, and it is the true intent and meaning of this act, that the said *Daniel Heister*, the younger, shall have and be entitled unto, and he is hereby declared to be vested with an estate during the term of his own life, of and in all and singular the aforesaid premises," &c.

It was admitted that the lands mentioned in this act of assembly were the lands mentioned in the declaration, and that *Daniel Heister*, the younger, and *Rosannah* his wife, the persons named in the said law, entered and were seized under said law of the lands therein mentioned, and both died without issue; that *Elizabeth*, wife of *Upton Lawrence*, one of the lessors of the plaintiff, and who is the other lessor, is heir at law of the said *Rosannah*, and as her heir at law claims, and makes title to the said lands, in the said law and declaration mentioned. That the defendants, (now appellees,) are devisees of the said lands in fee, under the will of *Daniel Heister*, the younger, duly executed, and claim the same as his devisees. The defendants then read to the court and jury an original deed from *Daniel Heister*, the younger, and *Rosannah* his wife, before named, with the several endorsements, certificates, and acknowledgment thereon, with the deposition thereto annexed, taken by consent of parties. This deed was dated the 10th of February 1782, and was "between *Daniel Heister*, the younger, of *Upper Salford* township, in the county of *Philadelphia*, and state of *Pennsylvania*, and *Rosannah* his wife, of the one part, and *William Heister* of the town of *Reading*, in the county of *Berks*, and state aforesaid, of the other part," and stated, that in consideration of £7500 specie, they granted, &c. unto the said *William Heister*, &c. 1400 acres of land in *Washington* county, state of *Maryland*, and one house and five lots in *Elizabeth* town, 500 acres, part of the said 1400 acres, beginning at, &c. 800 acres, another part, &c. beginning, &c. and the reversion, &c. and also all the estate of them the said *Daniel Heister*, and *Rosannah* his wife, &c. The deed was signed, sealed and delivered, by *Daniel Heister*, jun. and by *Rosannah* his wife, in presence of *George Smith* and *Henry Funk*, and a receipt for the consideration money was also signed by the grantors. It was thus acknowledged—"On the fourteenth day of February 1782, before me, *George Bryan*, esquire, one of the justices of the supreme court of the state of

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*Pennsylvania*, came *Daniel Heister*, the younger, and acknowledged the within indenture to be his act and deed, and the lands and premises therein mentioned to be the right and estate of the within named *William Heister*, for the uses and purposes therein mentioned. Also on the same day and year, came *Rosannah Heister*, the wife of the said *Daniel Heister*, before me, and acknowledged the said within indenture and instrument of writing to be her act and deed, and the lands and premises therein mentioned to be the right and estate of the within named *William Heister*, his heirs and assigns, for ever, according to the true intent and meaning thereof, and for the uses and purposes therein mentioned: And the said *Rosannah Heister* being of lawful age, and by me privately examined out of the hearing of her said husband, confessed that she made the same acknowledgment willingly and freely, and without being induced thereto by fear or threats of, or ill-usage by, her husband, or fear of his displeasure. Taken and certified by me,

*George Bryan*, (Seal.)

*Pennsylvania*, ss. His excellency *William Moore*, Esquire, president, and the supreme executive council of the commonwealth of *Pennsylvania*, To all to whom these presents shall come, Greeting. Know ye, that the honourable *George Bryan*, whose name is subscribed to the foregoing instrument of writing, was at the time of subscribing the same, and now is, one of the justices of the supreme court of the said commonwealth, and full faith and credit is and ought to be given to him as such. Given, by order of the council, under the hand of his excellency *William*

*Moore*, esquire, president, and the  
(Seal of the State of seal of the state, at *Philadelphia*,  
*Pennsylvania*.) this fourteenth day of February anno  
domini one thousand seven hundred  
and eighty-two.

*Wm. Moore*, President.

Attest. *T. T. Matlack*, Sec'y."

The deed was recorded on the 7th of May 1782, amongst the records of *Washington* county. Annexed to it was the deposition of *George Smith*, proving, among other things respecting the declarations of *Mrs. Heister* in relation to the deed, that the said deed was signed, sealed and delivered, by the grantors therein named, as their act and deed, &c. It was also admitted that *Daniel Heister*, and *Rosan-*

nah his wife, were respectively above the ages of 21 at the time of the execution of this deed; and that the facts stated in the deposition annexed to the deed were true. It was also admitted that *William Heister* executed a deed to *Daniel Heister*, the younger, dated the 14th of March 1782, for the same lands as mentioned in the deed from *Daniel Heister*, and wife, to *William Heister*, in consideration of £8000 specie. The grantor and grantee are both stated in the deed to be of the state of *Pennsylvania*. The deed was acknowledged by the grantor before two justices of the peace of *Washington* county in this state, on the 14th of March 1782, Annexed to it was a letter of attorney to *Tho. Sprigg*, *John Kershner*, and *Henry Schnebly*, to acknowledge the above deed, dated the 15th Feb. 1782. The deed was recorded in records of *Washington* county the 7th of May 1782. The defendants then prayed the court to direct the jury, that on the above facts the lessors of the plaintiff were debarred and foreclosed from making title to said lands as heirs to the said *Rosannah*. Of this opinion the court, [*Buchanan*, Ch. J. and *Shriver*, A. J.] were, and directed the jury accordingly. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, and EARLE, J.

*Martin*, *Pinkney*, (Attorney-General, U. S.) and *Mason*, for the Appellant, contended, 1. That a married woman could not convey her inheritance where nothing passed from her husband; and that as the deed from *Daniel Heister*, and *Rosannah* his wife, to *William Heister*, so far as respected the husband, not being legally executed and acknowledged, was a nullity, that deed did not convey or pass the estate of the wife in the lands therein mentioned, although her acknowledgment of it was in the mode pointed out by law. They referred to 1 *Blk. Com.* 468, 442, 445. 1 *Bac. Ab.* tit. *Baron and Feme*, (C) 476, (J) 495, 497. The act of 1715, ch. 47, s. 8, 9, 11. 4 *Vin. Ab.* tit. *Baron and Feme*, (P) 66. The acts of 1752, ch. 8, and November 1766, ch. 14, s. 2, 3, 4, 6. 1 *Pow. on Cont.* 6, 93, 97. *Jacob's L. D.* tit. *Deed*. *Ibid* tit. *Conveyance*. *Ibid* tit. *Feoffment*. *Co. Litt.* 327, b. 2 *Bac. Ab.* tit. *Discontinuance*; and *Nicholson's Lessee vs. Hemmley*, 3 *Harr. & M'Hen.* 409.

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2. That the acts of assembly have not been complied with in taking the acknowledgment of Mrs. *Heister*. They referred to the acts of 1752, *ch.* 8, and November 1766, *ch.* 14. 6 *Bac. Ab.* 377, 388, on the construction of statutes; and *Bedell vs. Constable, Vaugh.* 179.

3. That no parol evidence was admissible to prove the declarations of Mrs. *Heister* as to her motives in executing the deed referred to. They cited *Negro James vs. Gaither*, 2 *Harr. & Johns.* 176.

*Key, Shaaff, and Taney*, for the Appellees, contended, 1. That although the deed from *Daniel Heister*, and wife, to *William Heister*, did not operate in law to pass the estate or interest of the husband, as it was not legally acknowledged, yet it being regularly acknowledged by the wife, it passed her estate, and was legally operative as against her. They referred to 2 *Bac. Ab.* tit. *Grant*, 528. *Co. Litt.* 272, (n), 331, b, 343, (n). *Litt. s.* 607, 615. *Needler vs. Winchester*, *Mo.* 225. *Bedford's case*, 7 *Coke*, 8. The act of 1715, *ch.* 47, s. 11. 1 *Bac. Ab.* tit. *Baron & Feme*, (B). *Wood vs. Owings*, 1 *Crunch*, 239; and *Taylor vs. Horde*, 1 *Burr.* 91.

2. That the parol evidence offered in relation to this deed was admissible. They cited *Hall vs. Gittings*, 2 *Harr. & Johns.* 383. That if an action of covenant had been brought on the deed, parol evidence would be admitted to prove its execution.

CHASE, Ch. J delivered the opinion of the court. This case has been ably and amply discussed by the counsel, and placed in every point of view of which it is susceptible, or which ingenuity, united with profound legal knowledge, could suggest, although the court think the first and important question lies within a narrow compass, and did not seem to admit of that diffusive range of argument in which the counsel have indulged, they have been much gratified by the discussion.

The first and great question is, Whether the deed from *Daniel Heister*, and wife, to *William Heister*, is clothed with those requisites and solemnities which the law has prescribed to give it validity to pass the interest of the wife in the lands in question? The court, in forming their judgment, have considered the three acts of assembly of 1715, 1752 and 1766, as being *in pari materia*, and have

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endeavored to expound them in such manner as is most correspondent with the apparent intention of the legislature; and to guide them in their decision, have adverted to the law as it stood prior to the introduction of the various acts of assembly on the subject.

Independent of the acts of assembly, there was no legal mode by which the wife could transfer her interest but by common recovery and fine. These modes were attended with difficulty, great expense; and considerable delay. The first, although a fictitious proceeding, was conducted as a real action, to recover the wife's land; on the second, more in the form of a conveyance, the wife was examined by the court to know if she parted with her interest willingly.

The legislature which passed the act of 1715, as to the lands of a *feme covert*, had two important objects in view—The first to provide a facile and expeditious mode for conveying the wife's interest in land; the second to protect the rights of a *feme covert*, and to prevent her husband's passing away her lands, without her consent, declared on an examination made and certified in a particular manner.

Under the act of 1715, the wife, if she is named as a grantor in a deed of bargain and sale, shall be barred of her lands if she acknowledge the deed in the manner prescribed by that act. This certainly means, if she join her husband, who is also a grantor, in the said deed. The legislature never intended the wife should pass her interest, unless her husband, as grantor, joined in the deed.

The act of 1766 is more explicit than the act of 1715, and enacts, that if any *feme covert*, joining with her husband in any of the several conveyances before mentioned, i. e. feoffment, grant, &c. when the *feme covert* hath the right, title or interest, of the lands, tenements and hereditaments, or any part thereof, by such conveyance, intended to be given, granted, &c. she shall, by such execution of the said conveyance, examination, acknowledgment and enrolment, be barred. This act plainly shows, that where the interest of the *feme covert* is to be conveyed or barred, she must join with her husband in the conveyance which is proper to pass the interest intended to be transferred, which conveyance shall be acknowledged by the husband. The second section enacts, that no estate of inheritance or freehold, or any estate for above seven years, shall pass, un-

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less the deed or conveyance shall be acknowledged. The sixth section, which refers to the second, proves incontrovertibly, that the deed or conveyance in which the *feme covert* is to join with her husband to pass her interest in land, must be a deed or conveyance *acknowledged* by her husband, because no interest or estate in land, for more than seven years, can pass, except the conveyance be acknowledged.

To pass the interest of the wife in her land, the husband and wife must join in the deed as grantors, and the deed cannot be legally efficient and operative to pass her interest, unless it is acknowledged by the husband, for without the solemnity of acknowledgment by the husband, it is not his deed or conveyance to pass the inheritance or freehold, or any estate for above seven years.

JUDGMENT REVERSED. (a)

(a) See the act of 1816, ch. 164.

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HUTCHINGS VS TALBOT *et al.* Lessee.

An amendment may be made to a declaration in ejectment so as to change the demise from a joint one by all the lessors, to separate demises for undivided portions.

The change of the name of the fictitious lessee in the amended declaration, is of no consequence, the defendant having afterwards appeared to it, and entered into the common rule. *Quere*, if it may not then be considered as a new action?

APPEAL from *Baltimore County Court*. An action of ejectment was brought on the 12th of March 1807, in the name of *Richard Smith*, on a joint demise to him by *Talbot*, and others, on the 1st March 1807, for the recovery of four tracts or lots of land, Nos. 33, 36, 39 and 48.

The defendant, (now appellant,) appeared and entered into the common rule. At October term 1808, the plaintiff prayed leave to amend his declaration, which was granted by the court; and at the next term. (March 1809,) a new declaration was filed, in the name of *Richard Fenn*, on separate demises to him by the said *Talbot*, and others, each on the 1st of January 1808, of an undivided third

A copy of the qualification of G D, as one of the commissioners to preserve confiscated *British* property, purporting to have been made before W H, a justice of the peace, certified by the auditor general as a true copy taken from the original filed in his office; and a copy taken from the proceedings of the said commissioners stating that G D appointed a commissioner, &c. produced a certificate of his qualification, &c. certified as above, with proof by a witness that he had examined that part which purports to be the qualification of G D, and that it is a true copy of the original, in the hand writing of G D, and that the name W H, signed thereto, was in the hand writing of the said W H; and that the other copy was a true copy from the Journal of proceedings of the commissioners, &c. admitted to be read in evidence.

A deed executed by certain persons, stating themselves to be commissioners appointed to preserve confiscated *British* property, to certain purchasers of such property, is sufficient to vest a title in the purchasers, so as to enable them to support an action of ejectment for the land conveyed.

A grant dated the 5th of February 1802, to E and D, for the same land conveyed by the commissioners appointed to preserve confiscated *British* property, to the lessor of the plaintiff, on the 12th of December 1793, which grant recited that E O purchased the land of the commissioners, a certificate whereof was lodged in the land office; that E O sold the land to E S, who died intestate, and that the land had descended to E and D, his heirs at law—*Held*, that the legal title in the land did not pass to E and D by the grant.

part of four lots or tracts of land, being part of a tract of land called *My Lady's Manor*, and which lots are distinguished and known by Nos. 33, 36, 39 and 48. To which the defendant appeared at the said term, entered into the common rule, and pleaded the general issue.

1. At the trial the plaintiff offered to read in evidence the following paper: *Maryland*, sct. On the 12th day of July, in the year 1781, came before me, the subscriber, one of the justices of the peace for *Anne-Arundel* county, *Gabriel Duvall*, and made oath that he, as commissioner under the act for appointing commissioners to preserve confiscated *British* property, will to the best of his skill and judgment execute the trust reposed in him, and the duties of his office, diligently and impartially, according to the tenor of the said act.

*Wm. Hyde.*

The copy from the original qualification filed in my office.

*Robt. Denny*, Auditor Gen'l.

Friday July 13, 1781. *G. Duvall* appd. comm. by the govr. and co. in the room of Col. *Forrest* who resigned, produced a certificate of his qualification in the manner required by law.

True copy from the books of the commissioners for the preservation and sale of confiscated *British* property, lodged in my office.

*Robt. Denny*, Auditor Gen'l.

Auditor's Office, *Annapolis*, April 16, 1809.

Having first given evidence by *Luther Martin*, a witness duly sworn, that he had examined that part of the said paper which purports to be the qualification of *Gabriel Duvall*, as one of the commissioners of confiscated *British* property, and that the said part is a true copy of the original qualification in the hand-writing of said *Duvall*, filed in the office of *Robert Denny*, auditor of the state, and that the name of *William Hyde*, signed thereto, as being a justice before whom the said *Gabriel Duvall* was sworn, was in the hand-writing of said *Hyde*, and that the residue of the said paper is a true copy from the journal of proceedings of the commissioners, kept by their clerk, which were in the auditor's possession, and under his care, and by him produced. The defendant objected to the reading of said paper in evidence. But the Court, [*Nicholson*, Ch. J.] overruled the objection, and suffered it to be read to the jury. The defendant excepted.

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2. The plaintiff then gave in evidence thirty-three deeds, recorded among the land records of *Baltimore* county, for the conveyance of confiscated *British* property, wherein *Gabriel Duvall* and *Clement Holliday*, as commissioners for preserving of confiscated *British* property, are the grantors. And also read in evidence a deed from the said "*Clement Holliday* and *Gabriel Duvall*, to *Thomas. Mary*, and *Anne Talbot*, three of the lessors of the plaintiff, dated the 12th of December 1785, and stated to be to them from *Clement Holliday* and *Gabriel Duvall*, two of the commissioners appointed to preserve confiscated *British* property;" and also stating, that on the 22d and 23d of October 1782, the commissioners for the time being, by virtue of an act of the general assembly, entitled, "An act for the sale of certain confiscated *British* property pledged for the redemption of certificates," and another act, entitled, "An act to postpone the sale of certain confiscated *British* property for the redemption of certificates," and by virtue of other the acts of the general assembly touching and concerning the confiscation, preservation, and sale of *British* property, did sell and dispose of *My Lady's Manor* in *Baltimore*, or *Baltimore* and *Harford* counties, and at the said sale *Edward Oldham* of *Baltimore* county, for and on behalf of the said *Mary, Anne*, and *Thomas Talbot*, became the purchaser of lots Nos. 33, 36, 39 and 48, &c. Whereby was granted, &c. to the said *Mary, Anne*, and *Thomas Talbot*, as tenants in common, and not as joint tenants, the said lots, &c. The said deed was regularly acknowledged and recorded. He also gave in evidence, that before the institution of this suit *Mary* married *Dickerson Gorsuch*, and that *Anne* married *Thomas Bond*, two of the lessors of the plaintiff, and that they are now their respective wives. The defendant then prayed the opinion of the court, and their direction to the jury, that the plaintiff was not entitled to recover. Which direction the court refused to give. The defendant excepted.

3. The defendant then read in evidence a patent, dated the 8th of February 1802, to *Elizabeth Miles* and *Dixon Stansbury*, reciting, that "*Aquila Miles*, and *Elizabeth* his wife, by their petition to the chancellor did set forth, that a certain *Edward Oldham* purchased of the commissioners for confiscated estates Lots Nos. 33, 36, 39 and 48, lying in *Baltimore* county, parts of *My Lady's Manor*,

certificates whereof were returned to the land office; that the said *Edward Oldham*, afterwards sold the said lots for a valuable consideration, to *Edmund Stansbury*, (late deceased,) and by an instrument of writing under his hand, bearing date the 14th day of October 1783, requested that the said lots might be conveyed to the said *Stansbury*; that the said *Edmund Stansbury* departed this life in the year 1801, without having made a will, whereupon his estate descended to the petitioners *Elizabeth* and *Dixon Stansbury*, now in his minority, his only children and heirs at law. The petitioners therefore prayed that patents might issue to them for the said lots. Patents were accordingly ordered. The state did therefore grant to them lot No. 36, &c. It was admitted there were three other patents, of the same tenor and date, to same patentees, for the other three lots in the declaration mentioned. The defendant also gave in evidence, that the said patentees were the children of *Edmund Stansbury*, and that he the defendant was the tenant of said patentees. He also gave in evidence, that the lands specified in said patents, and the premises in the declaration mentioned, were the same. And he then prayed the court to direct the jury, that the legal title in the premises passed under and became vested in the patentees, in virtue of the said patents, and that the plaintiff was not entitled to recover. This direction the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, and JOHNSON, J.

*T. Buchanan*, for the Appellant, contended, 1. That a declaration in ejectment being an original process cannot be amended, because there was nothing to amend by. The amendment in this case was unauthorised so as to change the demise. An amendment might be permitted to enlarge the term, but for no other purpose. Here the amendment introduced a new title—the parties and demises were totally different. The original lessee could not recover under the first declaration, the lease therein being a joint demise of all the lessors.

2. That the evidence offered in the first bill of exceptions, to prove that Mr. *Duvall* was a commissioner of confiscated British property, was not sufficient. That copies

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from the commissioners books were not evidence. But if those books were to be considered as now belonging to the auditor's office, such copies should be certified and proved, as directed by the act of 1798, *ch.* 108. The evidence of Mr. *Duvall's* appointment could only be had from the records of the council, by whom it was made, that less evidence was not admissible, except by proof that there was no entry of the kind on those records, when inferior evidence might have been received. It was not proved, (as it could not be,) that Mr. *Duvall* was dead; and as he was not dead his evidence might have been admitted to prove his appointment,

3. As to the *second* bill of exceptions. If the evidence offered was sufficient to prove Mr. *Duvall* to be one of the commissioners appointed in the place of one of those named in the act of October 1780, *ch.* 49, who is said to have resigned, yet it is contended, that there was no power given to the commissioners to convey any land which they were authorised to sell. He referred to the acts of October 1780, *ch.* 45, *ch.* 49, and *ch.* 51, and 1785, *ch.* 66.

4. As to the *third* bill of exceptions. That *Oldham* was a purchaser from the commissioners of the property in question, and if he purchased for the lessors of the plaintiff, it was a trust which the commissioners could not notice, and could only be enforced in equity. If the commissioners had authority to convey, they should have conveyed to *Stansbury* as the assignee of *Oldham*,

*Martin*, for the Appellee, contended, 1. That an amendment might be permitted in an action of ejectment. That it was allowed by the general court in *Stewart et al. Lessee vs. Mason*. On the appearance of the defendant to the declaration filed in 1809, all defects, if any, were waived, and the action from that time may be considered as a new one, and the prior proceedings may be excluded from the record, so that it is wholly immaterial whether the leave to amend was proper or not,

2. As to the *first* bill of exceptions. The appointment of Mr. *Duvall* as a commissioner, was not to be found on the proceedings of the council, and the only evidence of it was in the auditor's office. The act of 1798, *ch.* 108, only points out a new way of proving the papers in that office. Here the copy was proved by a person who had examined

it with the original. It was correctly received in evidence under the spirit of the act of 1798, and independent of that act the copy might be received upon common law principles. He cited 2 *Esp. Dig.* (473,) 764, (475,) 766, (514,) 783.

3. As to the *second* bill of exceptions. The copies being received as evidence laid the foundation for what was afterwards introduced. This is a case where the law dispenses with the best evidence which the nature of the case would admit of. It is not necessary to prove more than that an officer was such *de facto*, and acted as such. He referred to 2 *Esp. Dig.* 783, (515.) *Owings vs. Wyant*, 8 *Harr. & M. Hen.* 393.

4. The deed by the commissioners was prior to the grant. If the chancellor had known of the deed he would not have granted the patent. There is no other evidence of the assignment to *Stansbury*, but the recital in the grant. As the state's right had passed by the commissioners' deed, nothing passed by the grant.

THE COURT concurred with the County Court in the opinions expressed in the several bills of exceptions; and were of opinion there was no error in the proceedings.

JUDGMENT AFFIRMED.

WALSH VS. GILMOR, *et al.*

DECEMBER.

APPEAL from *Baltimore County Court*. This was an action of *assumpsit*, brought in the general court, by the

defendant, relative to a contract for the sale of Brandy, and for submitting their dispute to arbitrators. — *Held*, that the whole correspondence on the subject, if produced, would be received in evidence, so far as the same might be explanatory of the terms of the reference, and what was intended to be submitted by the parties to the arbitrators. That if the plaintiff would not produce all the letters, the defendant might give evidence of their contents, so far as they related to the reference. But if the letters were not produced, the jury ought not to presume that they would, if produced, operate against the plaintiff, and go to prove that the terms of the reference were different from those declared upon by him.

A paper signed by the defendant as a submission to reference, is competent evidence, although the plaintiff did not produce and read to the jury the letters of the defendant upon the subject of the reference.

Whether the counsel for the plaintiff is bound to answer whether he has or has not in his possession, certain letters written by the defendant to the plaintiff, relative to the subject in dispute?

If an award, made in pursuance of a submission by the parties, exceeds the subject matter referred, it does not annul the original contract, which is the subject of the reference, further than the award pursues and is conformable to the terms of the reference.

The terms and stipulations between the parties on which their matters in dispute were to be submitted to reference, are matters of fact to be determined by the jury.

As to what is legal evidence of a sale made at auction—The entries made by a clerk to the auctioneers are not the best evidence.

Damages cannot be recovered for noncompliance with an award, except so far as the award is conformable to the submission.

If part only of a subject matter is referred to, and awarded upon by arbitrators, the party is at liberty to comply with the award, without also complying with all the terms of the original agreement.

The court will not permit a statement of facts, which is irrelevant to the subject matter, to be added to a bill of exceptions taken at the trial of a cause.

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Where the plaintiff had produced in evidence certain letters written to him by the

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appellees against the appellant. The declaration contained two counts. In the *first count* it was stated, that whereas the plaintiff, on the 27th of July 1795, and long before and after, were joint partners in trade and commerce, trading under the name and firm of *Robert Gilmor* and company: And whereas the plaintiffs were the owners of a quantity of Brandy, to wit, 102 pipes, then shipped on board a certain ship called *The Ann*, and then on her voyage from *Bordeaux*, in *France*, to the port of *Baltimore*, to wit, at the county aforesaid: And whereas on the said day and year aforesaid, at the county aforesaid, it was agreed between the plaintiffs, by the name of *Robert Gilmor* and company, and the defendant, that the defendant would purchase of the plaintiffs whatever Brandy they might have on board the said ship called *The Ann*, from *Bordeaux*, supposing the quantity of 90 pipes, or thereabouts, at the rate of one dollar and fifty cents per gallon, whatever the proof might be, provided the said Brandy arrived at the said port of *Baltimore*, in the county aforesaid, in six weeks from the said day and year last aforesaid. The defendant also agreed to give the plaintiffs his, the defendant's note, with *John Carrere* as his security, or his the defendant and *John Carrere's* notes, payable at three and four months, for the amount of the said Brandy, the date of the said notes to commence from the delivery of the said Brandy by the plaintiffs to the defendant. And the plaintiffs do aver, that the said Brandy arrived in the port of *Baltimore*, in the county aforesaid, within six weeks after the day and year last aforesaid, to wit, on the 1st day of August 1795, and that the plaintiffs on the 5th day of Au-

Where the court refused to direct the jury, that the evidence offered was sufficient for them to find for the plaintiff in an action upon an award for a noncompliance therewith.

An award made in pursuance of a submission to arbitrators, either separate from, or connected with, the original contract, is not legal or competent evidence in support of a count in the declaration founded upon the original contract.

Where a party refuses to keep goods according to contract, after they have been delivered to him under the contract, and the other party takes them from his warehouse with his knowledge and acquiescence, for the purpose of sale at auction, &c, the contract is not rescinded.

In actions founded on contracts, the contract must be set out either in the words in which it is made, or according to the legal effect; and contracts being in their nature entire, if the contract proved, and that recited upon, be different in any part, the variance is fatal.

Where an award was considered as being within the submission of the matter in controversy.

Whatever is alleged in a declaration as inducement and is not impertinent and foreign to the action must be proved as alleged; and when a contract is alleged and described, a variance is equally fatal, whether the action be upon the contract itself or upon some collateral matter.

Where an award directed that the defendant should give an endorsement, "as per agreement submitted to the arbitrators and acknowledged by the parties," and though it may be susceptible of being made certain and good by reference to the agreement to which it relates, if there be no sufficient averment in the declaration by which the defect is cured, both the declaration and award are bad.

The omission of an averment is sometimes aided after verdict, on the ground that every thing may be presumed to have been proved, which was necessary to sustain the action; but where the bill of exceptions contains all the evidence offered to the jury, and upon which the court are required to direct them, that the plaintiff is not entitled to recover, the verdict produces no such effect.

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gust in the year aforesaid, at, &c. afterwards delivered the said Brandy to the defendant. And whereas afterwards, to wit, on the 19th day of August, in the year aforesaid, at, &c. certain differences and disagreement took place between the plaintiffs and the defendant, of and concerning the said Brandy, for the settlement and determination thereof the plaintiffs, by the name of *R. G. & Co.* and the defendant, afterwards, to wit, on the 19th day of August 1795, at, &c. submitted themselves to the award of *John Stricker* and *John Holmes*, arbitrators, by them the plaintiffs and the defendant indifferently chosen and named, to award, order and adjudge, respecting the difference and disagreement between them the plaintiffs and the defendant, of and concerning the said Brandy; and in case the said *John Stricker* and *John Holmes* should differ in opinion, then they the said *Stricker* and *Holmes* may choose some third person. Upon which the defendant afterwards, that is to say, on, &c. at, &c. in consideration that they the plaintiffs, at the special instance and request of the defendant, assumed upon themselves, and to the defendant, then and there faithfully promised to the defendant, that they, the plaintiffs, would well and faithfully perform and fulfil the award, order and determination, of them the said *Stricker* and *Holmes*, so as aforesaid to be made on the part of them, the plaintiffs, to be performed and fulfilled, the defendant upon himself assumed, and to the plaintiffs then and there faithfully promised, that he the defendant would well and faithfully perform and fulfil the award, order and determination, of the said *Stricker* and *Holmes*, so as aforesaid to be made, on the part of him, the defendant, to be performed and fulfilled. And the plaintiffs in fact say, that the said *Stricker* and *Holmes*, on the 22d of August, in the year aforesaid, at, &c. took upon themselves the burthen of the said award, and then and there, in due manner, made and gave their award and final determination, in writing, of and concerning the premises so submitted to them as aforesaid, and by the said award did then and there award and order, that the defendant do choose, and that he is bound to take, ninety pipes, or ten thousand gallons, out of the Brandy delivered him by *R. G. & Co.* and that he ought to give an endorser, as by the agreement submitted to the said *Stricker* and *Holmes*, and which said agreement was acknowledged by the plaintiffs and the defendant, to the

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said *Stricker and Holmes*; of all which premises the defendant afterwards, to wit, on, &c. at, &c. had notice; whereby the defendant was bound to choose the said 90 pipes, or 10,000 gallons, out of the Brandy delivered to him by the said *R. G. & Co* and to give an endorser, according to the agreement aforesaid between him the defendant and the plaintiffs, and acknowledged by them as aforesaid and according to the form and effect of the said award, and the promises and undertakings of the defendant so made as aforesaid. Yet the defendant, not regarding his said agreement, nor his said promises and undertakings, so by him in this behalf made, but contriving, &c. the plaintiffs, &c. hath not yet chosen the said 90 pipes, or 10,000 gallons, out of the Brandy delivered to him the defendant, by the plaintiffs, nor hath he the defendant given an endorser, as by the agreement aforesaid made between the defendant and the plaintiffs, and acknowledged by them as aforesaid, according to the form and effect of the said award, although the defendant was thereto requested by the plaintiffs, to wit, on, &c. and often afterwards; but to choose the said 90 pipes, or 10,000 gallons, &c. delivered, &c. according to the said award of, &c. or to give an endorser, &c. the defendant hath hitherto wholly refused, &c. The *second count*. And whereas also, the plaintiffs, on the said 27th of July 1795, and long before and after, were partners, &c. And whereas the plaintiffs were owners of a quantity of Brandy, to wit, 102 pipes, then shipped on board a certain ship called *The Ann*, and then and there on her voyage from *Bordeaux*, in *France*, to the port of *Baltimore*, to wit, at the county aforesaid—And whereas on the day, &c. it was agreed between the plaintiffs, by the name of *R. G. & Co.* and the defendant, that he the defendant would purchase of the plaintiffs whatever Brandy they the plaintiffs might have on board the said ship called *The Ann*, from *Bordeaux*, supposing the quantity of 90 pipes, or thereabouts, at the rate of one dollar and fifty cents per gallon, whatever the proof might be, provided the said Brandy arrived at the said port of *Baltimore*, in the county aforesaid, in six weeks from the said day and year last aforesaid. And the defendant also agreed to give the plaintiffs his the defendant's note, with *J. C.* as his security, or his the defendant and *J. C.*'s notes, payable at 3 and 4 months, for the amount of the said Brandy; the dates of the said notes to

commence from the delivery of the said Brandy by the plaintiffs to the defendant. And the plaintiffs do aver, that they were owners of the said 102 pipes of Brandy on board the said ship called *The Ann*, on her voyage from *Bourdeaux*, in *France*, to the port of *Baltimore*, and that the said 102 pipes of Brandy afterwards, and within six weeks from the said 27th of July 1795, to wit, on the 1st of August, in the year last aforesaid, arrived in the port of *Baltimore*, &c. And the plaintiffs do aver, that they, confiding in the promise and undertaking of the defendant, made as aforesaid, afterwards, to wit, on the 5th of August, in the year aforesaid, at, &c, delivered the said 102 pipes of Brandy to the defendant. Nevertheless the defendant, &c. refused to give his note to the plaintiffs, with the said *J. C.* as his security, or to give the notes of the defendant and *J. C.* to the plaintiffs, payable at 3 and 4 months, for the amount of the said Brandy, or for the amount of any part thereof, the date of the said notes to commence from the delivery of the said Brandy, according to the agreement aforesaid between the defendant and the plaintiffs, although the defendant was afterwards requested so to do by them the plaintiffs, on the 24th of August 1795, and often afterwards, at, &c. But the defendant so to do hath hitherto wholly refused, and still doth refuse, to the damage, &c. The defendant pleaded the general issue.

1. *The first bill of exceptions.* At October term 1803, in the general court, the plaintiffs at the trial gave in evidence a contract entered into by the defendant, being a letter dated the 27th of July 1795, addressed by him to the plaintiffs; it was as follows: "I agree to purchase from you whatever Brandy you may have on board *The Ann* from *Bourdeaux*, supposing the quantity 90 pipes, or thereabouts, at the rate of one dollar and fifty cents per gallon, whatever the proof may be, provided it arrives here in six weeks from this date. I agree also to give you my note, with *John Carrere* as security, or mine and *John Carrere's* note, payable at 3 and 4 months, for the amount of the said Brandy; the date of the notes to commence from the delivery of the said Brandy." The plaintiffs also gave in evidence, that the ship *Ann*, in the contract mentioned, arrived at the port of *Baltimore* within six weeks from the date of the contract, having a cargo of 102 pipes of Bran-

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dy on board, the property of the plaintiffs, and that the Brandy was received by the defendant's clerk, according to his directions, in his warehouse, about the 1st of August 1795. That the defendant, after examining the Brandy, refused to comply with his contract, and in consequence thereof the dispute between the plaintiffs and the defendant, concerning the Brandy, was submitted to *John Stricker* and *John Holmes*. And the plaintiffs offered in evidence the following written submission, executed by the defendant, on the 19th of August 1795, being a letter addressed by him to the plaintiffs: "I agree that Col. *Stricker* and Mr. *John Holmes* should be judges in the dispute respecting the Brandy, and in case of a disagreement in opinion between those two gentleman, that they may chuse a third." And that the arbitrators took upon themselves the burthen of arbitrating between the parties, and after full hearing of each party, made the following awards: "We the subscribers, being called upon to arbitrate a difference between Messrs. *Robert Gilmor & Co.* and Mr. *Robert Walsh*, relative to a sale of Brandy by the former to the latter—after hearing the allegations of the parties, considering the contract, and all other circumstances relating thereto, do award that Mr. *Walsh* do chuse, and that he is bound to take, ninety pipes, or 10,000 gallons, out of the Brandy delivered him by *Robert Gilmor & Co.* and that he ought to give an endorser, as per agreement submitted to us, and acknowledged by the parties.

Jno. Holmes

John Stricker.

*Baltimore, August 22, 1795."*

The plaintiffs further offered evidence, that after the award was made and delivered to the defendant, they applied to him to comply with it, and that he refused to do so, declaring that he would not take any of the Brandy according to the terms of the contract and the award; and that thereupon the plaintiffs informed the defendant, that unless he took the Brandy, according to the contract and award, they would send the Brandy to public vendue, and there have it sold on his account, and hold him answerable for the difference between the price for which it should sell, and the sum which, by the contract, the defendant was to give for it. That the plaintiffs did accordingly send the Brandy to Messrs. *Jates and Campbell*, auc-

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tioneers in the city of *Baltimore*, by whom it was sold at public auction for a less sum than the defendant had contracted to give for it. The defendant then offered evidence, that the communications between the plaintiffs and himself respecting the contract, were by letters from one to the other, and not in person: That the proposition for referring the dispute between them was first made by the plaintiffs to him, by letter from *R. G.* one of the plaintiffs, dated the 17th of August 1795, as follows: "I received your note of this morning, and observe the new ground you have taken as a reason for not complying with your contract. It will answer no good end for me to enter into a discussion with you on the business, as it is not probable that it would tend to a settlement of it. You are, as a man of honour and a merchant, bound to abide by your contract, unless you can show such reasons as will justify a noncompliance; those now adduced appear to me totally inadequate to this purpose. There is then but one course left, which is, to lay our several pretensions before indifferent men, and to abide by their determination. If you agree to this, let two men be named, they choosing a third, and let us enter in bonds for abiding by their award. Let me have an answer as early this morning as convenient, as I want the business terminated without loss of time, that something may be immediately done with the Brandy." That this letter speaks of one from the defendant to the plaintiffs; and that this letter from the plaintiffs produced an answer from the defendant to them, of the 18th of August 1795, in which they offered to prove that he consented to a reference, and speaks of the terms of the submission, and refuses to let the arbitrators determine whether the defendant shall or shall not give an endorser to the plaintiffs; which facts are inferred from the following letter of *R. G.* one of the plaintiffs, to the defendant, dated the 18th of August 1795: "I received your's of this morning. The gentlemen who may be appointed will judge of every circumstance you have to offer as a justification for your refusal to take the Brandy. If they think they are valid, I shall cheerfully acquiesce. But on the other hand, should they determine that you are bound to take the whole, or a part of the Brandy, I cannot doubt for a moment your acquiescence upon the principles of our contract. You voluntarily named Mr. *Carrere* as the endorser of your notes. I could

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not doubt but he had authorised you so to do; for of his own accord he told me that he would be security for you if you purchased the Brandy. I therefore will not harbour a thought of a refusal of this kind, as I think it would be injurious to your honour. I shall name Col. *Smith*, or Mr. *Patterson*, if you have no objection; or you may choose which you like, and name to me two gentlemen, and I will choose one of them. For obvious reasons you will see the necessity of having this business early finished, and I beg you will speak to the gentleman you may choose this afternoon, as I shall, provided you inform me you have no objection to those I have named, so that they may go upon it next day." The defendant also read in evidence another letter of *R. G.* one of the plaintiffs, to the defendant, dated 19th of August 1795, and which was as follows: "I cannot believe that you will refuse to comply with your own engagement, provided indifferent men say you ought; however, you will do in that as you think proper. I have no objection to any of the gentlemen you have named, and therefore name Col. *Stricker*. As you have named the whole of them I suppose you can have no objection to Mr. *Holmes* being the other. If this is agreeable, let them be requested to serve to-day, and they may meet on the business to-morrow." That this last letter produced the note from the defendant to the plaintiffs, and by them herein before stated as having been written on the 19th of August 1795. The defendant then proved by *Robert Gilmor, Junior*, a witness summoned and sworn by the plaintiffs, that the above mentioned letters from the defendant to the plaintiffs, of the dates of the 17th and 18th of August 1795, did relate to the matter in dispute between the parties, and did also relate to the agreement between the plaintiffs and the defendant, for submitting such matter to the arbitrament of the persons before named, and that the letters from the defendant to the plaintiffs were now here in court, and in the possession of the counsel for the plaintiffs. The defendant then prayed the court to make an order upon the counsel for the plaintiffs to produce those letters, for the purpose of having the same read to the jury as evidence.

DONE, J. (*Sprigg*, J. concurred,) (*a*). The Court are of opinion, that the whole correspondence on this subject, (*a*) *Chase* Ch. J. owing to indisposition, did not attend.

if produced, will be received in evidence so far as the same shall be explanatory of the terms of the reference, and what was intended to be submitted by the parties; and that if the plaintiffs' counsel will not produce the letters from the defendant to the plaintiffs, the defendant may give evidence of the contents of the same, so far as they relate to the reference. The plaintiffs excepted.

2. *The second bill of exceptions.* The court having received evidence that certain letters, bearing date on the 17th, 18th and 19th of August 1795, respectively, passed from the defendant to the plaintiffs, and from the plaintiffs, relating to the agreement between them for submitting the matter in dispute between them (upon which this suit is founded,) to reference; in virtue of which submission, the award in this suit declared upon was made; and the defendant having on his part produced the letters from the plaintiffs to him, and having proved by the admission stated in the former bill of exceptions, and also offered to prove by the testimony of *Robert Gilmor, junior*, (who deposed that he had seen those letters in *Bullimore* about ten days ago, and had them in his possession, and delivered them over at that time to one of the counsel for the plaintiffs,) that the letters from him, the defendant, to the plaintiffs, are in the possession of the plaintiff's counsel, and now in court here: And the court having decided that those letters from the defendant to the plaintiffs are proper and competent evidence to be produced and read to the jury—and the plaintiffs having refused to produce any, except that stated to have been written on the 19th of August 1795, the defendant then prayed the court to direct the jury, that if they are satisfied that the letters from the defendant to the plaintiffs, of the 17th and 18th of August 1795, do relate to the agreement for submitting the dispute to reference, and that said letters are in the possession of the counsel for the plaintiffs and in their power to be produced here, and the same are not produced, that then the jury may and ought to presume, that the same, if produced, would operate against the plaintiffs, and go to prove that the terms of the submission to reference, agreed upon between the parties, were different from those declared upon by the plaintiffs.

*Mason, and W. Dorsey, for the Defendant, cited 2 Esp. Dig. 780, 782; and Armory vs. Delamaine, 1 Stra. 305.*

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*Purviance* and *S. Chase, jr.* for the plaintiffs, referred to the act of 1798, *ch.* 84.

THE COURT refused to give the direction prayed for. The defendant excepted.

3. *The third bill of exceptions.* The defendant then prayed the court to direct the jury, that the paper dated the 19th of August 1795, and admitted to be written and signed by the defendant, and by him sent to the plaintiffs, and produced and read by the plaintiffs to the jury, was not admissible evidence, and ought not to be regarded by them, unless the plaintiffs also produced and read to the jury the letters of the defendant to the plaintiffs upon the subject of the reference, dated the 18th and 19th of August 1795.

*Mason*, for the Defendant, cited 2 *Esp. Dig.* 780.

THE COURT refused to give the direction. The defendant excepted.

4. The defendant's counsel having sworn *John Purviance*, Esquire, one of the plaintiffs' counsel, offered to put to him the following question: "Have you in your possession the letters mentioned to have been written by the defendant to the plaintiffs of the 18th and 19th of August 1795?" To this question being put to the witness, the counsel for the plaintiffs objected.

DONE, J. It is not proper for the counsel to answer the question, unless he is willing to answer it.

SPRIGG, J. I think the question ought to be answered.

5. *The fourth bill of exceptions.* The plaintiffs having given in evidence the contract before mentioned, then gave in evidence the following letter from the defendant to the plaintiffs dated the 17th of August 1795: "When I agreed to purchase the Brandy which you should receive by the ship *Ann*, at the rate of one dollar and fifty cents p. gallon, it was intended by Mr. *Gilmor* and myself that it should be of the quality generally received from *Bordeaux*, and called *Bordeaux Brandy*; that the quantity was about 90 pipes; and under an assurance from Mr. *Gilmor*. that no more Brandy would arrive in the ship, but that which was consigned to your house, to wit, the ninety pipes, and a small quantity of old Cogniac,

which Mr. *Gilmer* had ordered for his own use, and the use of two other friends—I therefore calculated that the amount in money of the purchase would be from 14 to 15,000 dollars, counting the guage of the *Bourdeaux* pipes, as usual, not more than 100 to 110 gallons, and had prepared an endorser for my notes accordingly. Being in *Philadelphia* when the *Ann* arrived, and the Brandy landed, it was received in my warehouse—On my return home, two or three days after it was landed, and on examining it, I found the quality not *Bourdeaux* Brandy; the quantity about one half more than was expected, and about 50 pipes of Brandy offered for sale in the town, in other hands, which were imported in the *Ann*. I therefore inform you, that I do not hold myself bound to the purchase, because the quality is not *Bourdeaux* Brandy; the quantity is much more than I counted upon, or had a right to count upon, and because a considerable quantity has been imported in the ship, and put into the market, more than that received by your house.” The plaintiffs also gave in evidence the letter from them to the defendant, dated the 17th of August 1795, as herein before stated, and also the following letter from the defendant to the plaintiffs, dated the 18th of August 1795: “In your note of yesterday you say I have taken a new ground as a reason for my not complying with my contract, and that as a man of honour and a merchant, I am bound to abide by my contract, unless I can show such reasons as will justify a noncompliance, and that, to you, those adduced appear totally inadequate to the purpose—and you observe, that there is but one way left, which is, to lay our several pretensions before indifferent men, and to abide by their determination, and if I agree, to let you know, that two men may be named, and let us enter into bonds for abiding by their award. In answer, I observe, that I have taken no new ground; that my objections are true, two of them you will not, I believe, deny—those are, that the quantity is more than about ninety pipes, and that you assured me no other Brandy would be imported in the ship. I am not afraid to meet the decision of indifferent judges; they may be named when you please; and as to our entering into bonds, I feel myself at a loss to know what I should bind you to. If my objections are considered as sufficient to clear me from being bound to the purchase, I have then no other claim on you, but to pay

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for the portage of the Brandy to my warehouse, and for your doing so, I desire no bond. If the gentlemen who may be chosen would say that my objections are not well founded, and that, therefore, I must be bound to the purchase of the Brandy, I shall agree, so far as relates to any act within my own power; but I must observe, it may not be in my power to obtain the endorser you called for." The plaintiffs also gave in evidence the letter from them to the defendant, dated the 18th of August 1795, herein before stated; and also the following letter from the defendant to the plaintiffs, dated the 19th of August 1795: "I repeat, that if it is judged that I shall be obliged to keep the Brandy, or any part of it, which I think scarcely possible, I will offer you no endorser. I do believe, that neither Gen. *Smith* or Mr. *Patterson* would act on this occasion, as I suppose they would consider themselves not conversant enough with Brandies to determine whether this in question is *Bordeaux* or Straights Brandy; either of these gentlemen could very readily discover that this Brandy is not as good as they are accustomed to use, but not being in habits, perhaps, of observing nicely the different qualities, would be at a loss to give your's a name. I therefore object to either of these gentlemen; and propose for your choice of one, three gentlemen, dealers in the article—they are Mr. *John Holmes*, Col. *Stricker*, and Mr. *Engelhard Yeiser*." The plaintiffs also offered in evidence the letter from them to the defendant, dated the 19th of August 1795, herein before stated; also the submission entered into after the letters, dated the 19th of August 1795, and herein before stated; and also the award made in pursuance thereof. The plaintiffs then prayed the direction of the court to the jury, that the award was authorised by the submission, and within the terms of it.

*Martin*, (Attorney-General,) for the Plaintiffs, cited *Green vs. Warren*, 1 *Blk. Rep.* 475.

**BONE, J.** The court are of opinion, that the terms and stipulations between the parties, on which their matters in dispute were to be submitted to reference, are matters of fact to be determined by the jury, on evidence adduced to them. The court, therefore, cannot give the direction prayed for by the counsel of the plaintiffs. The plaintiffs excepted.

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6. *The fifth bill of exceptions.* The plaintiffs further proved, that on the 12th of October 1795, they drew the following written order on the defendant, to deliver the Brandy to *Yates* and *Campbell*: "You will deliver Messrs, *Yates* and *Campbell* the 101 pieces of Brandy, and you will account with me for the piece that was staved. My son *Robert* will call upon you to-day or to-morrow for that purpose." That in pursuance of that order, the Brandy was delivered on the 12th of October 1795, to *Yates* and *Campbell*, and by them sold at public auction, by order of the plaintiffs, on the 16th of October 1795. The plaintiffs then produced, and offered to read to the jury, a paper purporting to be the original list or memorandum, upon which was entered the different casks containing the Brandy, and upon which the entries were afterwards made that were transferred to the books of *Yates* and *Campbell*, the persons to whom the same were sold by *Yates* and *Campbell*, and the prices at which the same were sold; and proved that the same was made out in the handwriting of one ——— *Patrick*, who at that time acted as clerk of *Yates* and *Campbell*, and he being present at the sale, made out the same by their order; and that *Patrick* was now dead. To the reading of this paper to the jury, the defendant objected, on the ground of its being inadmissible evidence.

DONE, J. The court are of opinion, that the objection is not a good one, and they permitted the paper to be read to the jury. The defendant excepted.

7. The plaintiffs then prayed the opinion of the court, and their direction to the jury, that if the jury should believe that no part of the contract was submitted to the arbitrators, except whether the defendant should take any and what quantity of the Brandy, that then the award made cannot operate to change, alter or annul, the contract, either as to the price to be paid, the time when the payments were to be made, or the manner in which the payments were to be secured, those parts of the contract not being submitted to the arbitrators.

DONE, J. The court are of opinion, that the award does not destroy or annul the original contract between the parties, further than the award pursues, and is conformable to the terms of the reference.

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The court are also of opinion, that the plaintiffs cannot on the first count in their declaration recover damages, except for a noncompliance with the award, so far as the same is conformable to the submission.

8. *The sixth bill of exceptions.* The plaintiffs offered in evidence, that the defendant, on the 27th of July 1795, entered into a contract with the plaintiffs, by the two following letters: [The first being a letter from the plaintiffs to the defendant, and the other from the defendant to the plaintiffs.] "Agreeable to our promise, we now conclude on selling you whatever Brandy we may have on board the *Ann* from *Bourdeaux*, upon the terms you proposed; that is, you are to pay us at the rate of one dollar and fifty cents per gallon for the whole, which we estimate at about 90 pipes, (exclusive of some old cogniac we have on board which is not meant to be sold,) whatever the proof may be, provided the ship arrives in six weeks from this time. On the delivery of the Brandy you are to give us your and Mr. *J. Carrere's* notes for the whole, at 3 and 4 months from the commencement of the delivery—Your agreeing to the preceding terms will be binding on," &c. Then the other letter from the defendant to the plaintiffs was dated the 27th of July 1795, and is before stated in the first bill of exceptions. The plaintiffs also offered in evidence, that the said vessel did arrive within six weeks, having on board 13,025 gallons, equal to 124 pipes of Brandy, which in the absence of the defendant was received at his warehouse according to the defendant's directions. They also offered the several letters which passed between the plaintiffs and defendant, herein before set forth, dated the 17th, 18th, and 19th of August 1795; also the submission to the arbitrators and their award; and gave in evidence that a copy of the award was delivered to the parties. The plaintiffs then prayed the opinion of the court, and their direction to the jury, that supposing no part of the contract was submitted to the arbitrators, except whether the defendant should take any and what quantity of the Brandy, in that case the defendant by the award was bound to take 90 pipes, or 10,000 gallons, of the Brandy, but at the same time was not by the award entitled to take the same without complying with the terms of

the contract as to the price, the times of payment, and the manner in which the payment was to be secured.

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SPRIGG, J. (*Done*, J. not present,) refused to give the direction prayed for. The plaintiffs excepted.

9. *The seventh bill of exceptions.* The plaintiffs having offered in evidence, that on the 10th of October 1795, being Saturday, the plaintiffs called upon the defendant, and demanded of him whether he would retain the Brandy, so delivered into his warehouse, on the terms of the contract, and the award, to which the defendant replied that he would not, that he had never considered the Brandy as his, and that the plaintiffs might take it away whenever they pleased. That the plaintiffs then told the defendant, that they would take away the Brandy the next Monday, and if on a resale any loss should arise they, the plaintiffs, should consider the defendant responsible, and act accordingly. To which the defendant made no reply. The plaintiffs then proved, that on Monday the 12th of October 1795, they drew an order in writing for the Brandy, on the defendant. That in consequence of that order the Brandy was delivered by the defendant to Messrs *Yates and Campbell*, the persons in the order named. The defendant having offered to subjoin the above statement of the evidence admitted to have been given, to the statement of facts made by the plaintiffs, as the foundation of their prayer for the opinion of the court given on the preceding bill of exceptions,

THE COURT, [*Sprigg, J.*] refused to have the same added, on this ground, that the same had no relation to the subject matter by the prayer submitted for the consideration of the court. The defendant excepted.

10. *The eighth bill of exceptions.* Upon the statement in the *sixth bill of exceptions*, and the court having previously directed the jury, that by the award the defendant was bound to take 90 pipes, or 10,000 gallons, of the Brandy, the plaintiffs then prayed the opinion of the court, and their direction to the jury, whether, supposing no part of the contract was submitted to arbitrators, except whether the defendant should take any and what quantity of the Brandy, the defendant was in consequence of the award

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entitled to take the same, without complying with the terms of the contract.

SPRIGG, J. (*Done*, J. not present.) The Court are of opinion, that under the award the defendant was at liberty to keep the Brandy without complying with all the terms of the original agreement herein recited. The plaintiffs excepted.

11. *The ninth bill of exceptions.* The defendant, by his counsel, proposed to add the statement in the *seventh bill of exceptions*, to the last above statement; but the court refused to permit it to be added, upon the same ground it was refused to the statement in the *sixth bill of exceptions*. The defendant excepted.

12. *The tenth bill of exceptions.* The plaintiffs then gave in evidence, by Colonel John Stricker, one of the arbitrators, that previous to the award they the arbitrators never received any papers relative to the matter in dispute, from either of the parties, but in the presence of the opposite party; that the arbitrators, previous to the giving the award, had but one interview with the parties, when each made a verbal statement of their case, and the plaintiffs left with the arbitrators the letter from the defendant to them, dated the 27th July 1795, herein before stated. That he the witness, did not know whether the defendant saw that paper when it was delivered to the arbitrators by the plaintiffs, or not, and that he does not recollect whether the defendant did or did not agree to submit to the arbitrators whether he the defendant should give to the plaintiffs an endorser for the price of the Brandy, in case he should be adjudged by the arbitrators to take the same, or any part thereof. That the letter from the defendant to the plaintiffs, above stated, on the 27th July 1795, was the paper upon which the arbitrators acted; and that having determined that the defendant should keep 90 pipes, or 10,000 gallons, of the Brandy, the arbitrators determined that he ought to give an endorser, it being so provided by the contract. The plaintiffs then prayed the opinion of the court to the jury, that if they believed such evidence, that then such evidence is sufficient, in point of law, to support the first count in the plaintiffs' declaration.

SPRIGG, J. (*Done*, J. not present.) The court having already determined, "that the terms and stipulations be-

tween the parties, on which their matters in dispute were to be submitted to reference, and matters of fact to be determined by the jury," and the validity of the award thus depending on the opinion of the jury, they cannot give the direction as prayed. The plaintiffs excepted.

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13. *The eleventh bill of exceptions.* The defendant then prayed the opinion of the court to the jury, that the award produced and given in evidence to them is not admissible evidence to them upon the second count in the plaintiffs' declaration; and that upon that count it ought to be disregarded by them.

DONE, J. The court are of opinion, that the award, either separate from or connected with the original contract in this case, is not legal or competent evidence to be admitted in support of the second count in the plaintiffs' declaration. The plaintiffs excepted; and the verdict and judgment being for the plaintiffs, the defendant appealed to this court. The cause was argued on the *fifth* bill of exceptions, at December term 1806, before CHASE, Ch. J. and BUCHANAN, and GANTT, J. by *W. Dorsey* and *Harper*, for the Appellant; and *S. Chase, jr.* for the Appellees, and was reargued at December term 1807, before CHASE, Ch. J. and TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, J.

*W. Dorsey* and *Harper*, for the Appellant, stated, that the question to be argued on the *fifth* bill of exceptions, was, Whether the memorandum or original list of the sales of the Brandy ought not to have been admitted in evidence? They contended that it ought not, as it did not fall within the exception to the general rule of law, that the best evidence, of which the nature of the case was susceptible, must be given. That *Fates* or *Campbell*, both of whom were alive, ought to have been produced to prove the sale. They cited *Peake's Evid.* 10. *Price vs. The Earl of Torrington*, 1 Salk. 285. *Bull. N. P.* 282, 283. *Cooper vs. Marsden*, 1 Esp. Rep. 1. *Warren vs. Greenville*, 2 Stra. 1129. *Smartle vs. Williams*, 1 Salk. 245 & 280. *Williams vs. The East India Company*, 3 East, 192; and *Davis vs. Batty*, 1 Harr. & Johns. 264.

*Martin, Purviance*, and *S. Chase, jun.* for the Appellees, cited *Digby vs. Stedman*, 1 Esp. Rep. 329. *Pitman vs.*

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*Maddox*, 2 Sulk. 690. 1 *Lofft's Gilb.* ch. 1, p. 5; and *Biggs vs. Lawrence*, 8 T. R. 454.

THE COURT dissented from the opinion given by the General Court in the *fifth* bill of exceptions; and as no objections were urged against the opinions given in the other bills of exceptions; taken by the defendant in that court, they concurred therein.

CHASE, Ch. J. dissented, and delivered the following opinion: The question to be decided by the court, on the fifth exception, is, Whether the list or memorandum offered in evidence to prove the sale of the Brandy, and the price, was legal and competent evidence for that purpose? The material fact to be proved was the price for which the Brandy was sold, because on that depended the quantum of damages to be given by the jury.

The exception states, that — *Patrick* acted as clerk to *Yates* and *Campbell*, the auctioneers, who sold the Brandy; was present at the sale, and made the entries on the said list or memorandum by their order, from which the said entries were transferred to the books of *Yates* and *Campbell*, and that the said *Patrick* was dead.

Lord *Gilbert*, in his treatise on evidence, in page 16, explaining the rule of evidence he had before laid down, as the first and most signal, declares the true meaning of it to be, that no such evidence shall be given, which *ex natura rei*, or according to the nature of the transaction, supposes still a greater evidence behind in the parties possession or power.

The said rule, as explained and illustrated by *Gilbert*, is certainly the true rule, coincides with common sense, and is best adapted to the ascertainment of the truth of facts, and consequently most conducive to the promotion of justice.

The application of the rule depends on the nature of the case, and what is the best evidence in the power of the party to prove it.

The entries made by the clerk appointed for the purpose by the auctioneers, was the best evidence to prove the sale of the Brandy, to whom made, and the price, which the nature of the transaction, as disclosed by the exception, was susceptible of.

No person could prove the said entries but the clerk, if living, that being the best evidence of it. The clerk being dead, the inferior or secondary evidence may be resorted to—the proof of his hand writing, which is proof of the entries made on it. Such was the decision of Lord *Kenyon*, in the case of *Cooper vs. Mursden*, 1 *Esp. Rep.* 1, 2, where he said, “that the rule of evidence was clear, that entries in the books of bankers, or persons keeping books respecting their trade or business, could only be proved by the clerks who made the entries.”

According to the nature of the transaction, the clerk is the only person who could be supposed to have an accurate knowledge of the sale, the price, and the person to whom sold, and his testimony is the best evidence; and according to the nature of the case, no presumption arises that there is a greater evidence in the power or possession of the party to exclude the proof of the hand-writing of the clerk.

It is possible *Yates* or *Campbell*, or some of the persons present at the sale, might have had a knowledge of it, and the price; and if they had, they might have been examined to corroborate the evidence of the clerk, or to contradict it; and if examined by the adverse party, to contradict it, the question would be for the jury to determine on the respective credit of the witnesses, and could in no wise affect the competency of the testimony offered.

The memorandum or list of the clerk, appointed for the purpose, on which he made entries at the time of the sale from the mouth of the auctioneers, and according to directions publicly announced in the auction room, must be better evidence than the frail and fallible recollection of the auctioneer, who cannot be supposed, in the midst of a multiplicity of transactions in the course of a day, after a short lapse of time, to remember the sale of a particular lot of goods, the time when sold, the price, and the person to whom sold—all the above circumstances will appear on the memorandum or list of the clerk.

The law in requiring the best evidence, does not require all the evidence which might be given; for instance, if there are two witnesses to a deed, or a dozen present at the making of a verbal contract, the evidence of any one, while uncontradicted, is sufficient. *Peake's Evid.* 7.

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The case of *Price vs. Lord Torrington*, 1 Salk. 285, is more liable to objection than the present case. The clerk, who made the entry, had no knowledge of the delivery of the beer, but from the report of the drayman; but the clerk, who made the entry in this case, was appointed for the purpose, was present at the sale, and made the entry by the direction of the auctioneer, on his proclaiming the highest bidder, and the price, and having himself a knowledge of the sale.

According to the nature of the transaction in both cases, no person but the drayman could be supposed to be privy to the delivery of the beer, and no person could be supposed to have a knowledge of the sale and price but the clerk.

The case under consideration is similar, or nearly so, to the case of *Pitman vs. Maddox*, 2 Salk. 690, in which, on proving the hand-writing of the tailor's servant, who was accustomed to make entries in the shop book, he being dead, the shop book was allowed to be evidence, as no other person could be supposed to be conversant of the delivery of the clothes. The chief justice likened it to the case of proving the hand-writing of a witness to an obligation.

The case of *Smartle vs. Williams*, must have been decided on the ground, that the scrivener acted as clerk or agent of the mortgagee, and had power to receive the money, and on that supposition, the resemblance in the leading circumstances to the present case is very obvious, and without the aid of such supposition the decision cannot be law.

The judgment in *Williams vs. The East India Company*, 3 East, 192, is certainly good law, but the case is not analogous to the present.

In that case it was decided to be incumbent on the plaintiff to prove the want of notice or information of the inflammable quality of *Roghan*. There were only two persons who were privy to the transaction; the military conductor who delivered the *Roghan*, and the chief mate who received it and stowed it away; either of whom could have proved whether notice was given or not. The chief mate was dead, but the military conductor was living, and the *prima facie*, or secondary evidence, was rejected, because it appeared, by the transaction disclosed in proof, that the plaintiff had greater evidence in his power.

In the case of *Warren vs. Greenville*, 2 *Strange*, 1129, although in the opinion of the court the evidence offered to fortify the presumption arising from length of time was not necessary, yet they declared it to be legal and admissible. The entries in the attorney's debt book, who drew the common recovery and surrender, were read and admitted as evidence, on the ground he was employed to draw them, and being dead, the proof of his hand-writing was the best evidence, because, if living, he could have proved those circumstances.

In this case the entries, when proved, are evidence, because made by authority, and by the person appointed clerk for that purpose. The cases generally in which a memorandum in writing is resorted to for the purpose of refreshing the memory, are those where it is made by the witness of his own accord, without authority, and merely to perpetuate the remembrance of the transaction, that he may relate it accurately in case he should be called on, and not done by him as an agent in the usual course of business. In such cases the memorandum is not evidence.

I am of opinion the judgment of the General Court be affirmed.

NICHOLSON, J. concurred with the Chief Justice.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

At the new trial in the County Court in March 1809, the plaintiffs, (now appellees,) gave in evidence the letter from the plaintiffs to the defendant of the 27th of July 1795, and the one from the defendant to the plaintiffs of the same day, and that the ship *Ann* in the contract mentioned, did arrive at the port of *Baltimore* within six weeks from the date of the said contract, with a cargo of 111 pipes of Brandy on board, the property of the plaintiffs, part of which, to wit, nine pipes, were imported for the plaintiffs' own use; that there were also on board of the said ship 38 pipes of Brandy belonging to other persons than the plaintiffs; that the said 102 pipes of Brandy, immediately on their being landed from on board the ship, were sent by the plaintiffs to the defendant's warehouse, where it was received by a clerk of the defendant, the defendant being then in *Philadelphia*; that the defendant, on his return to *Baltimore*, after an examination of the Brandy, refused to comply with his contract, and in consequence thereof a

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dispute arose between the plaintiffs and defendant respecting the Brandy: whereupon they agreed to submit the settlement of said dispute to *John Stricker* and *John Holmes*. And gave in evidence the following letters containing the submission, viz. one from the defendant to the plaintiffs, dated the 17th of August 1795; another from the plaintiffs to the defendant of the same day; another from the defendant to the plaintiffs of the 18th of August 1795; another from the plaintiffs to the defendant of the same day; another from the defendant to the plaintiffs of the 19th of August 1795; another from the plaintiffs to the defendant of the same day; and another from the defendant to the plaintiffs of the same day. And that the said arbitrators took upon themselves the burthen of arbitrating between the parties, and after full hearing of each party, did make an award on the 22d of August 1795, and which was given in evidence. The plaintiffs further gave in evidence, that after the award was made and delivered to the defendant, the plaintiffs applied to the defendant, on Saturday the 10th of October in the year aforesaid, to know whether he would retain the Brandy on the terms of the contract and award made by the arbitrators; that the defendant replied that he would not; that he had never considered the Brandy as his, and that the plaintiffs might have it whenever they chose; that thereupon the plaintiffs informed the defendant, that unless he took the Brandy according to the contract and award, that they would, on the Monday following, take it away and send it to be sold at auction on the account of the defendant, and would consider him as responsible for the difference between the price for which it would sell, and the sum which by the contract and award the defendant was to give for it. And that the plaintiffs did send to the defendant an order, in writing, for the delivery of the Brandy, dated the 12th of October 1795. And did, on the same day accordingly, on the Monday following, take the Brandy away from the warehouse of the defendant, and sent the same to Messrs. *Fates* and *Campbell*, then being auctioneers in the city of *Baltimore*, by whom it was sold at auction on a credit of 4 and 6 months, for a less sum than that for which the defendant agreed to give for it. The defendant then prayed the opinion of the court, and their direction to the jury, that the act of the plaintiffs in taking away and selling the Brandy, did in law absolve

the defendant from any responsibility to the plaintiffs, under or by reason of the said award and contract. But the Court, [Nicholson, Ch. J.] refused to give the direction. The defendant excepted.

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2. The defendant then gave in evidence, that there were imported by the plaintiffs in the ship *Ann*, at the time aforesaid, over and above the quantity of Brandy meant to be sold, the quantity of nine pipes of Brandy for their own use, being the Brandy meant and alluded to in that part of the letter of July 27, 1795, from the plaintiffs to the defendant, which is in the following words, viz. "Exclusive of some old Cogniac we have on board, which is not meant to be sold." The defendant then prayed the opinion of the court to the jury, that on the evidence so given by the plaintiffs and the defendant, the plaintiffs were not in law entitled to recover on the *second* count in their declaration. This direction the court refused to give. The defendant excepted.

3. The defendant further prayed the opinion of the court to the jury, that the letters between the plaintiffs and the defendant, produced by the plaintiffs as containing the submission of the parties to an arbitration, which letters are six in number, and bear date on the 17th, 18th, and 19th of August 1795, respectively, did not authorise the arbitrators to make and return the award aforesaid, in that part of it which relates to the defendant's giving an endorser to the plaintiffs. But the court refused to give the direction. The defendant excepted,

4. The plaintiffs then gave in evidence, that all the letters herein before referred to, were laid before the arbitrators before they made the award given in evidence. The defendant then further prayed the opinion of the court to the jury, that the plaintiffs are not entitled to recover on the *first* count in the declaration. This direction the court also refused to give. The defendant excepted; and the verdict being for the plaintiffs, he appealed to this court.

The cause was argued at this term before BUCHANAN, EARLE, and JOHNSON, J.

*Key, W. Dorsey and Harper*, for the Appellant, contended,  
1. That neither of the counts in the declaration was suffi-

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cient to support the plaintiffs' action, as no valid judgment could be entered thereon.

2. That the award was not a good one in point of law, and it was not helped by the averments in the declaration.

3. That the plaintiffs taking the brandy out of the possession of the defendant, as stated in the *first* bill of exceptions, absolved the defendant from all liability on account of it.

4. That the refusal of the court below, as expressed in the *second* bill of exceptions, to direct the jury that the plaintiffs could not recover on the *second* count in the declaration, was erroneous.

5. That the submission did not authorise the arbitrators to award that the defendant should give an endorser; and that the court below ought to have directed the jury agreeably to the defendant's prayer as stated in the *third* bill of exceptions.

6. That the court below ought to have directed the jury agreeably to the defendant's prayer in the *fourth* bill of exceptions, that the plaintiffs were not entitled to recover on the *first* count in the declaration.

On the *first* and *second* points they argued, that the award was not a good one in point of law; that every award must be certain, and to ascertain that which was before uncertain, it might be made good by reference to something that was certain. Here the *first* count in the declaration stated that the award was that the defendant should take 90 pipes, &c. of Brandy, and that he ought to give an endorser *as per agreement*, &c. and there is no averment what the agreement was to which the award referred. They cited *Kyd on Awards*, 138, 132. That in the *second* count there is no averment of what quantity of Brandy was contained in the 90 pipes, which was material to be ascertained, as the defendant was to pay a particular price per gallon, so that the extent of the defendant's liability was not stated.

On the *third* point they contended, that it was a clear rule of law with respect to contracts, that where one of the parties disabled the other from performing, he could not recover. The contract here was put an end to by the plaintiffs, who might have recovered if the Brandy had not been taken out of the defendant's possession. That act of theirs rescinded the contract. It was not a case where a

resale was authorised so as to bind the defendant for any deficiency.

On the *fourth point* they contended, that the proof offered in evidence did not support the *second count* in the declaration; and that the principle of law was, that the plaintiffs must prove the contract as laid. They referred to 1 *Esp. Dig.* tit. *Assumpsit*, (139) 262. This count states, that the defendant was to have whatever Brandy the plaintiffs might have on board the vessel; and the proof is that he was not to have the whole.

On the *sixth point* they argued, that the plaintiff could not connect the agreement stated in the *first count* with that stated in the *second*; but if it is connected as matter of substance and not inducement, then the contract stated, being contrary to the proof, cannot aid it. The contract being stated must be proved as laid. They cited *Bristow vs. Wright*, *Doug.* 665; and 1 *Chitty's Plead.* 304.

*Martin, Pinkney* (Attorney General of U. S.) and *Purviance*, for the Appellees, on the *first point* contended, that if there was any defect in the declaration it was cured after verdict. They referred to 1 *Com. Dig.* 137. 5 *Com. Dig.* 342, 354. *Rushton vs. Aspinall*, *Dougl.* 683. 1 *Chitty's Plead.* 298, 306; and *Peppin vs. Solomons*, 5 *T. R.* 496.

On the *third point* they referred to 1 *Esp. Dig.* (18) 56. *Sands vs. Taylor*, 5 *Johns. Rep.* 395.

BUCHANAN, J. delivered the opinion of the court. This case is brought up on *four bills of exceptions*. The question on the first of which is, Whether the contract between the parties was rescinded by the act of the plaintiffs in removing the Brandy, which formed the subject of the agreement, from the warehouse of the defendant, and exposing it to sale at public auction? In deciding this question we feel no difficulty. The Brandy was taken from the defendant's warehouse with his knowledge and acquiescence, not with a view to rescind the contract, but because he had refused to keep it, and the sale at auction was resorted to as a criterion by which to ascertain the quantum of injury the plaintiffs had sustained by the defendant's violation of his engagement. By the refusal of the defendant to receive it, the Brandy remained the property of the

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plaintiffs, who had a right to dispose of it as they pleased—the removal and sale, therefore, did not operate in law to rescind the contract. The defendant had notice of the course they meant to pursue, and with a full knowledge of their object and intention in taking it away, consented to the removal of it. If an action had been brought to recover the price of the Brandy delivered, the removal and sale by the plaintiffs would have been a good defence, for the value could not be demanded when the party was deprived of the article itself. But this suit is not for the price of the Brandy; it is founded on the refusal of the defendant to receive it according to the terms of his agreement, and the object is to recover damages for that violation of his contract, from a liability to which the defendant was not absolved by the act of the plaintiff in taking away and selling the Brandy. We therefore concur in opinion with the court below on the *first* bill of exceptions—But differ from that court in the opinion to which the *second* bill of exceptions is taken.

In actions founded on contracts, the contract must be set out, either in the words in which it is made, or according to the legal effect; and contracts being in their nature entire, if the contract proved, and that declared upon, be different in any part, the variance is fatal. The *second* count in the declaration is on a special agreement. The letter from the plaintiffs of the 27th July 1795, and the answer from the defendant of the same date, taken together, form the contract between the parties; and it clearly appears from those letters to have been their intention to except from their agreement the Cogniac which was on board the ship *Ann*. In the contract set out in the declaration there is no such exception, but the agreement is stated to have been for “whatever Brandy the plaintiff might have on board the *Ann*.” There is an evident variance, therefore, between the contract declared upon, and that given in evidence at the trial, which we think fatal, and are of opinion that the plaintiffs were not entitled to recover on the *second* count in the declaration.

The question on the *third* bill of exceptions is too plain to admit a doubt. Upon the slightest examination of the correspondence between the parties, relative to a reference of the subject of dispute, it will appear that the whole matter in controversy was submitted to the arbitrators, and that

the award is within the submission. The *third* bill of exceptions therefore fails.

The *fourth* bill of exceptions presents the same question that is involved in the second, and the same variance appears between the allegation and the proof. But it is said that the agreement set out in the *first* count in the declaration, being only stated as inducement, the same exact certainty is not required as if the action had been founded on the contract itself. But whatever is alleged as inducement, and is not impertinent and foreign to the cause, must be proved as alleged; and when a contract is alleged and described, a variance is equally fatal, whether the action be upon the contract itself, or upon some collateral matter. In this case, therefore, even if it was unnecessary to have set out the agreement between the parties, yet being set out, and not being impertinent, but connected with the cause, it ought to have been proved as stated, and not being so proved, the plaintiffs were not entitled to recover on the *first* count in the declaration. We therefore dissent from the opinion of the court below on the *fourth* bill of exceptions.

The objection to the uncertainty of the award in that part in which the defendant is directed to give an endorser, "as per agreement submitted to the arbitrators and acknowledged by the parties," is well taken, and though it may be susceptible of being made certain and good by reference to the agreement to which it relates, yet there is no sufficient averment in the declaration by which the defect is cured, and therefore both the declaration and the award are bad in that particular. The answer, that the defect is cured after verdict, does not remove the objection. The omission of an averment is sometimes aided after verdict, on the ground that every thing may be presumed to have been proved which was necessary to sustain the action; and if it should be admitted that the want of an averment in this case would have been aided, after verdict, if the cause had been brought up by writ of error on the pleadings alone, yet the bills of exceptions taken at the trial, which contain all the evidence offered to the jury, and upon which the court was required to direct them that the plaintiffs were not entitled to recover, strips the verdict of all its healing power, and presents the question wholly uninfluenced by it; for nothing can be presumed to

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have been proved which does not appear in the bills of exceptions; and the plaintiffs, not being entitled to recover on the evidence so stated, the legal intendment fails by which alone a verdict can be called in aid of a title defectively set out.

Other points were started by counsel in argument which it has not been thought necessary to examine. The court is of opinion that the judgment of the court below ought to be reversed.

JOHNSON, J. dissented.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DECEMBER.

DORSEY VS. DORSEY'S HEIRS AND EX'RS. *et al.*

On a bill filed in chancery by E H D, to vacate a sale made of his lands when he was a minor, by E D, a trustee appointed under a decree of the court of chancery, which were, it was alleged, purchased by S G, for the use of E D, the trustee, and to annul the deeds executed in consequence of that sale—*Held*, that there being sufficient evidence to prove that S G did purchase the lands in question for E D, the trustee; and on the established principle, that a trustee can never be a purchaser at his own sale, the deeds made in consequence thereof be vacated, there being no evidence that E H D, the only person interested ever assented to the purchase; and that E H D pay to E D the amount paid by him for the purchase of the lands, &c.

The testimony of a witness as to the contents of a letter, who had never seen the person who wrote the letter, and had no knowledge of his hand writing is inadmissible.

The declarations of a man respecting his title to lands made before he parts with his estate therein, are evidence against him, and all claiming under him.

Where it seemed to be unnecessary that the legatees should be made parties to a bill filed against the heirs and executors of the testator.

It seems not to be necessary on a bill filed to set aside a sale made by a trustee, to make the representatives of the person, who purchased at such sale for the benefit of the trustee, parties to the suit.

APPEAL from a decree of the Court of Chancery. A bill was filed on the 21st of December 1800, by *Edward H. Dorsey* the appellant, against the heirs and executors of *Edward Dorsey*, the executors of *Caleb Dorsey*, and *Samuel Godman*. It stated, that *Caleb Dorsey*, possessed of a large landed and personal estate, by his will dated the 14th of March 1772, gave the following legacies to his daughters, viz. *Rebecca Ridgely* £1000 sterling, *Mary Pue* £1500 sterling, *Milcah Dorsey* £2000 sterling, *Eleonor Dorsey* £2000 sterling, *Peggy H. Dorsey* £2000 sterling, *Priscilla Dorsey* £1000 sterling, and to his grand daughter *Eliza G. Dorsey* £500 sterling, amounting in the whole to £10,000 sterling; and after several specific legacies, he gave the remainder of his personal property to his sons *Samuel* and *Edward*. His real estate he devised in tail, viz. to his son *Samuel* the following lands: *Chew's Resolution Manor Resurveyed*, *The Gore*, *Chew's Vineyard*, one undivided moiety of *Taylor's Forest*, and all the remaining unsold part of *The Mill Frog*, *Timber Ridge*, *Caleb's Delight Enlarged*, all his lots at *Elk Ridge Landing*, and all his part of the furnace and works at *Curtis's creek*, together with the land purchased and taken up for the use of the said furnace and works. To his son *Edward*, also in tail, *Caleb's Pasture*, *The Valley of Owings*, *Littleworth*, *Caleb's and Edward's Friendship*, and one undivided

moiety of *Taylor's Forest*, and all his part of the *Elk Ridge* furnace. In aid of the personal estate, and to discharge the legacies, and to leave personal property sufficient to carry on the *Elk-Ridge Furnace* and *Dorsey's Forge*, he directed that *Dorsey's Delight Enlarged, Timber Ridge, Mill Frog*, and also all his part of the furnace and works at *Curtis's creek*, together with all the other lands taken up and purchased for the use of the same, should be sold. The lands here mentioned are part of the lands devised to *Samuel*. Subsequent to the date of the will, and prior to the codicil, the testator purchased from *Alexander Lawson* his interest in the *furnace and works at Curtis's creek*; and thereby contracted a considerable debt, of which £3000 sterling were due at the testator's death, with interest from the 20th of May 1772. On the 21st May 1772, by a codicil, he devised the property purchased from *Lawson* to his sons *Samuel* and *Edward*, equally, the money due on the purchase to be paid by them equally. He also gave, by the codicil, the following legacies: To his daughters *Rebecca Ridgely, Mary Pue, Milcah Dorsey, Eleanor Dorsey, Peggy H. Dorsey*, and *Priscilla Dorsey*, each £600 sterling. The legacies to bear interest, and to be paid equally by his sons in three years. For the payment of the codicil legacies, he expressly makes the whole property devised to his sons liable, and explicitly declares, that the will legacies shall not be affected, but are to remain in the same situation as if the codicil had not been made. The amount of the will legacies, £10,000 sterling, or

£16,666 13 4

Amount of the codicil legacies

£3,600 sterling, or 6,000 0 0

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Currency £22,666 13 4

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The amount of the inventory  
returned on the 27th of July

1779, £10,479 10 0

List of sperate debts returned

the 23d of April, 1795, 608 12 0

Old current money add ¼ 2,619 0 2

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13,708 0 2

14th of November 1789, cre-

dits allowed, 1,153 16 3¼

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23d of April 1795,

786 0 14

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1,939 16 3

11,768 8 9

Deficient for the legacies, £10,898 8 7

On the 16th of October 1773, on the application of *Ridgely* and wife, *Pue* and wife, *Goodwin* and wife, *Buchanan* and wife, *Samuel* and *Eleanor Dorsey*, to the legislature, a law passed, authorising the persons above named, or the survivors, to sell the whole of the *Curtis's Creek Works*, and that one sixth of the money arising from the sale should be paid to the guardian of *Edward Dorsey*, (then a minor,) to be applied as the personal estate, and the residue to the discharge of the will legacies. The lands were sold, including those purchased from *Lawson*; and the money applied to pay the legacies, leaving *Lawson's* debt due. *Lawson* brought a suit against the executors of *Caleb Dorsey*, and at August term 1783, obtained judgment. In 1774 *Samuel Dorsey* died, leaving the complainant his heir in tail, aged two years. *Edward Dorsey*, his uncle, was appointed his guardian. On the 9th of June 1784, the executors of *Caleb Dorsey* filed a bill against the complainant, to obtain a decree for the sale of more real property to pay *Lawson's* debt, for the one half whereof it was alleged the complainant was liable. On the 30th of October, 1784, *Edward Dorsey*, his guardian, appeared and answered. On the 4th of November 1784, a decree was passed for the sale of *Taylor's Forest*, &c. and *Edward Dorsey*, the guardian, appointed the trustee to sell. On the 7th of November 1784, the trustee's bond was filed. The time when the sales were made does not precisely appear, but they must have been made about the 20th of December 1784, for six weeks notice was directed, and *Edward*, (the minor,) is charged with interest on *Lawson's* debt to that date. By the decree the trustee is directed, before the money arising from the sales was distributed, to obtain a bond from the complainants in that case, "to indemnify the defendant from all charges and demands on account of *Lawson's* judgment, and from all claims and demands, which the defendant hath been, or is or may be made chargeable by the codicil of *C. Dorsey's* will, or for or by any other ways or means whatever." The bond of indemnity was

never given; the sales never were ratified; nor was there any order passed for the distribution. The bill in the present case was filed to defeat the sales, made under the authority of the decree in the above case, of the executors of *Caleb Dorsey*; and it alleges that *Edward Dorsey*, the guardian, had formed a determination to get his ward's land, and for that purpose he assented to its being liable to *Lawson's* debt; that he procured himself to be appointed the trustee, and through the agency of *Samuel Godman*, purchased most of the land, and for less than the value. Although the sales (such as they were,) were made as early as December 1784, yet they were kept back until the 6th of August 1789. The account of sales then returned states, that lots No. 1, 2, 3 and 4, containing 763 acres, (part of *Taylor's Forest*,) were sold to *S. Godman* for

£3,733 0 2

That lot No. 5, containing 102 acres, was sold to *Edward Norwood*, for

869 13 1½

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£4,602 13 3½

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The conveyance by the trustee to *Godman* was made on the 1st of March 1785, for the consideration of £3,733 0 1½, and the reconveyance to *Edward Dorsey*, the trustee, was on the 12th of December 1785, for the consideration of £3,743. The relief prayed for by the bill is—*First*, a reconveyance of the land deeded to *Godman*, on the vacating that deed. *Secondly*, an account of the profits. *Thirdly*, an exemption from *Lawson's* debt, because the land, the origin of the debt, had been sold, and the proceeds applied to the payment of the legacies. The defendants, in their answers, make no material admissions—*Samuel Godman*, one of the defendants, did not answer the bill, having died soon after it was filed. Commissions issued, under which testimony was taken, which proved, among other things, that *Samuel Godman* acknowledged, within a month after the sale, that he purchased the land for *Edward Dorsey*, and that the land was always held, possessed and used, by *Edward Dorsey*, who immediately after the sale commenced cutting wood, &c. and that *Godman* never was in possession, or exercised any acts of ownership over it. That *Godman* had recently been released as an insolvent debtor, and had no visible property. *Prattus Godman*, son of *Samuel*

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*Godman*, deposed, that after his father's death, about three years before his, *Brutus's* examination, at the house where his father died near *Elk-Ridge*, he remembers seeing, amongst his father's papers, a letter to his father from *Edward Dorsey*, deceased, requesting his father to purchase the land called *Taylor's Forest* for him the said *Dorsey*.

The deponent did not recollect the date of the letter, or what had become of it, but he remembered that it requested his father to attend the sale for that business. The deponent did not know the hand-writing of *Dorsey*, but that the letter was signed with the name of *Edward Dorsey*.

KILTY, Chancellor, (September term 1808.) The main object of the bill appears to be to vacate the sale made by *Edward Dorsey*, as trustee, under the decree therein mentioned, as far as it related to the property purchased by a certain *Samuel Godman*, (for the use, as it is alleged, of the said *Edward Dorsey*,) and to annul the deeds executed in consequence of the said sale, on such terms, as on an account taken should appear to be proper.

But there are other objects which will require to be stated and disposed of. The bill prays for an account of the rents and profits of the complainant's estate received by *Edward Dorsey*, as his guardian; but from the answers of the defendants, the evidence taken, and the arguments adduced, it does not appear that this is relied on as a distinct ground for relief, or if it is, that a case is made out to entitle the complainant to relief on that account.

Another account is, that the complainant should not be liable for any part of the debt due from *Caleb Dorsey* to *Alexander Lawson*, because the land, the foundation of the debt, had been sold and applied to the legacies under the will of *Caleb Dorsey*. This allegation goes to impeach the decree made by the former chancellor in November 1784, for the sale of part of the real estate of the complainant, on a bill filed by the executors of *Caleb Dorsey*, in which his will and codicil, with a copy of the judgment by *Lawson* against them, were exhibited.

This decree could be opened only by a bill of review, or by a bill or petition, alleging that it was obtained by fraud. From the arguments of the complainant's counsel, it appears that the circumstance of the money due to *Lawson* not being chargeable to the complainant, is not relied on

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as a distinct and substantive ground of relief, but to be taken into the account in case of a vacation of the sale, but if this should not be the case, the charge is not supported so as to entitle the complainant to a decree on that ground. The main object of the bill, as above stated, is considered also as resting on distinct grounds. *First*, the circumstances attending the filing of the bill for the sale of the complainant's land, the answer by *Edward Dorsey*, as guardian, and his being appointed trustee, as they are alleged in the present bill. And *secondly*, the charge that *Edward Dorsey*, the trustee, was in fact the purchaser by the agency of *Samuel Godman*, who was returned as such, and that the lands were sold to him for less than their value. As to the first ground, there is nothing to show that the executors of *Caleb Dorsey* had any view in filing their bill, and obtaining a decree for a sale, more than to raise the sum for which *Lawson* had obtained judgment against them. The conduct of *Edward Dorsey* in that suit is not so clear of suspicion, although in his answer he states that a sale would be for the interest and benefit of his ward's estate, and would avoid the ruinous consequences of accruing interest; yet it is to be observed, that the answer was put in with unusual promptness; that the facts in the bill were fully admitted, and that in addition thereto, his consent in writing was given to the sale about to be decreed, and that he was himself appointed trustee. The chancellor considers this as the most doubtful part of the case, connected also with the time and manner of making the report or return of the sale; but notwithstanding his desire that rules against fraud, (as expressed by his predecessor in one of the cases cited,) should be as strict as possible, he is obliged to determine that these circumstances, (independent of the purchase being made by *Godman* for the trustee,) are not sufficient to establish the charge of fraud, as made in this part of the bill. The second ground is viewed as the most important in the bill, because, without giving a positive decision on it, the chancellor is strongly inclined to the opinion, that if established, it would either by itself, or in corroboration of the other circumstances, be sufficient to vacate the sale. It is therefore necessary to examine particularly the evidence relating to this charge. The chancellor cannot admit the position, that the circumstances of this case are such as to throw the *onus probandi* on the de-

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sendants, that the sales were to and for *Godman*. They were so returned by the trustee, though at a late period, and the proof of the allegations in the bill must of course come from the complainant. The circumstances relied on for this proof are the continued possession of *Edward Dorsey*, the date of the deeds, and (according to the complainant's argument,) the want of evidence of any payment by *Godman*. But if *Godman* is considered as the real purchaser, or if the complainant fails to prove that he was not such, it cannot be required, after the lapse of so many years, that the payment of the purchase money by him should be proved by the present defendants. And in this part of the case the chancery will consider the observations on both sides as to the time of filing the present bill. The bill for the sale of the present complainant's real estate was filed, and the decree passed, before the act of 1785. It might possibly have been filed under the act of November 1773, but was not so filed. That act gives to the infant six months after his coming to full age to show cause against the decree, and in *England*, the common course is, to decree in such cases with *nisi causa*, within six months after the infant should come of age; and this having been fixed on as a reasonable time, it seems to follow that an acquiescence, or a neglect of nearly six years, during three of which the trustee was living, and could have answered for himself, is a circumstance of considerable weight against the complainant, although not such as to be a bar to the relief prayed by him, if sufficient evidence should be produced; but the circumstances above stated do not amount to such evidence, although they create a strong suspicion. It remains to examine what is brought forward as direct evidence of the purchase by *Godman* having been made for *Edward Dorsey*, the trustee. *Caleb Owings*, one of the witnesses, says in answer to the 6th interrogatory, that it was so understood, (that is, that *Godman* purchased for *Dorsey*.) he thinks generally, at the time of the sale, but does not recollect that any person told him so. It is presumed there can be no doubt as to the insufficiency of this part of the testimony. The evidence of *Allen Dorsey* is to the same effect. *Samuel Norwood* and *Edward Norwood* both prove that *Samuel Godman* told them, or said, that he purchased the land for *Edward Dorsey*. The fact of his having so said must be considered as established fully

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by these witnesses; but it is also considered by the chancellor, as a point clear of doubt, that his declarations, as proved, not in the presence of the other party, and not assented to or uncontradicted by him, cannot be received as evidence. The next testimony is that of *Brutus Godman*, which is at least equally objectionable; for although the counsel for the complainant argues, "That the fact of such a letter being there is proved by him," yet it will appear to be a fact having no weight in the cause. This witness on his first examination, deposed, that about the year 1803, he remembered seeing among his father's papers a letter from *Edward Dorsey*, deceased, to the said *Samuel Godman*, to purchase the said land for him. But on his cross-examination he states that he had no other knowledge that the letter was written by *Edward Dorsey* than that his name was signed to it. He does not say that he had ever seen him write, or had any knowledge of his handwriting. If the letter was produced, and depended on his knowledge only, it could not be received as evidence, and yet it would be apparently a stronger circumstance than his deposition that such a letter existed. It may be an unfortunate circumstance for the complainant, that *Brutus Godman* did not know the hand-writing of *Edward Dorsey*, or that he did not preserve the letter. But supposing it to have been genuine, it only induces a belief that evidence then existed which is now totally lost. And here, without borrowing from the defendants' counsel, his remarks as to the cyphers, it may be justly said, that if what is stated by *Caleb Owings* and *Allen Dorsey*, as to what was understood at the sale, is not evidence; if the declarations of *Samuel Godman* to *Samuel* and *Edward Norwood* are not evidence, and if the circumstances as to the letter stated by *Brutus Godman* are not evidence, no greater effect can be produced by combining them together. It is certain that the terms of the decree for the sale, were not fully complied with by the trustee. The return or report was not made in due time, and the bond of indemnity against *Lawson's* claim has never been procured; but the report, though made at a late period, appears to have been so far received by the court, that no positive measures were taken against it; and it is not alleged that the complainant has sustained any loss for want of the bond of indemnity,

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or that he has been called on to pay again the debt due to *Lawson*, so that the money, for which the land sold, must be considered as applied to that debt, according to the report. For the reasons herein stated—*Decreed*, that the bill of the complainant be dismissed, but without costs. From that decree the complainant appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, and EARLE, J.

*Key*, for the Appellant. By the will of *Caleb Dorsey*, authority was given to his executors to sell certain lands, (but not *Taylor's Forest*,) to pay the legacies; the executors did sell, but it is not stated by them what lands they sold, and to what amount. The special authority given by the will to the executors was limited to the sale of the entailed lands for the payment of the legacies alone. The act of assembly of 1778, ch. 2, for the sale of the lands of *Caleb Dorsey*, for the payment of the legacies, was simply an authority to sell the *Curtis creek* lands, and there was no authority given to them to sell *Taylor's Forest*, either for the payment of the debts or the legacies. It is contended, on the part of the appellant, 1. That the bill, proceedings, and decree thereon, in 1784, for the sale of *Taylor's Forest*, were irregular. By the record of those proceedings it appears that the bill was filed against the appellant, then an infant, in June 1784, by the executors, for the sale of the real estate of *Caleb Dorsey* to pay *Lawson's* debt, without showing how the personal assets had been administered; that an answer by the guardian was filed in October 1784, admitting all the allegations stated in the bill, and praying that particular lands might be sold, and amongst others, *Taylor's Forest*. On the 4th of November 1784, a sale was decreed for cash, and *Edward Dorsey*, the guardian, appointed the trustee to make the sale, who gave bond on the 17th of November 1784. Six months notice in some newspaper was required by the decree to be given previous to the day of sale. The sale took place, of *Taylor's Forest* alone, before the 20th of December 1784, so that no such notice was or could be given, and on the day of sale, *Lawson's* debt was paid. There was no report of the sale made to the court, but simply an account filed in 1789 charging money paid to *Lawson*, &c. and crediting the sales to God-

man and Norwood of *Taylor's Forest*, and of this account there was no confirmation by the chancellor; nor was any bond given, as directed by the decree, by the claimant to the defendant, in the proceedings. It is contended that there was no legal foundation for filing the bill in 1784 by the executors, as they were not bound to pay the codicil legacies; that the bill was filed with a suppression of facts, and the statement in it did not place the subject matter properly before the chancellor; but being admitted by the guardian, the decree passed as a matter of course.

2. That *Edward Dorsey*, the guardian of the infant defendant in those proceedings, being the proprietor of the forge at *Elk Ridge*, and *Taylor's Forest*, a large body of woodland contiguous thereto, he was desirous of having that tract of land sold, so that he might become the purchaser, he therefore caused those proceedings to be instituted.

3. That the land was sold to *Samuel Godman* for the benefit of *Edward Dorsey*, the trustee, and for a sum of money greatly below its value.

4. That *Edward Dorsey*, the trustee, had possession of the land when he sold it, and continued to hold and claim it until his death, having immediately after the sale commenced cutting wood, &c. for his own use and benefit.

On the third point, he insisted, that it was fully proved by the testimony that *Godman* purchased the land for *Edward Dorsey*, the trustee. That even if *Dorsey* furnished *Godman*, (who is proved not to have been in a situation to make the payment,) with the money to pay for the land, he was a trustee for the benefit of *Dorsey*. He referred to *Villiers vs. Villiers*, 2 *Atk.* 72. To prove that the declarations of *Godman* were evidence, he referred to *Strode vs. Winchester*, 1 *Dickins*, 397. *Willis vs. Willis*, 2 *Atk.* 71. *Man vs. Ward*, *Ibid* 229. That the trustee could not purchase at his own sale, he cited *Wheddale vs. Cookson*, 1 *Ves.* 9. *Munro vs. Allaire*, 2 *Caine's Cases*, 192. *Oldin vs. Samborne*, 2 *Atk.* 15. *Sugd.* 391. *Turner vs. Bouchell*, (*ante* 99;) and *Conoway vs. Green*, 1 *Harr. & Johns.* 151. The recent insolvency of *Godman* shows that he could not command so large a sum as the purchase money for the land; and *Dorsey's* retaining the possession, and cutting so large a quantity as 30,000 cords of wood off the land, as is in proof, shows evidently that *Godman* purchased

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for *Dorsey*. The part of the land sold to *Norwood*, proved not to be better in any respect, brought a much higher price than that purchased by *Godman*, which was struck off for a sum \$6000 less than its value.

*Martin, Shaaff and Harper*, for the Appellees, contended, 1. That all the necessary and legal parties were not before the court; and that as the bill was dismissed it was of no consequence upon what ground, if it was correctly dismissed. They insisted that the legatees under the will and codicil of *Caleb Dorsey* should have been made parties, that they might show whether or not they had any interest. They referred to *Harr. Chan. Pr.* 32, 33. 1 *Eq. Ca. Ab.* 72. 2 *Eq. Ca. Ab.* 165 to 170. *Stafford vs. City of London*, 1 *Stra.* 95.

2. That the decree of 1784, which was fair and proper, and justified by the facts, could not be impeached; but that the copy of the proceedings and decree, as exhibited, not being under seal, cannot be evidence in this case. They cited *Norwood vs. Norwood*, 1 *Harr. & Johns.* 525.

3. That the declarations of *Samuel Godman*, made when he had an interest in the land, were not to be received as evidence against his alienee or vendee. They cited *Ford vs. Lord Grey*, 1 *Salk.* 286. *S. C.* 6 *Mod.* 44. That if *Godman* could not have been a witness at the time he made the declarations, they could never afterwards be evidence.

4. That the testimony of *Brutus Godman* could not be admitted in evidence on any principle, as he never had seen *Edward Dorsey* write, and did not know his handwriting, and because there was no evidence that the letter had been searched for and could not be found.

5. That there is not sufficient proof that *Samuel Godman* purchased the land at the instance and for the benefit of *Edward Dorsey*, the trustee; and that even if the purchase was for the benefit of the trustee, it did not, *ipso facto*, vacate the sale, which must depend upon application being made within a reasonable time to set it aside. That if the conduct of the trustee was fair and proper, and the sale was for the interest and advantage of the minor, it must be confirmed. That it had never been contended, in any case, that a purchase made by a trustee at his own sale, if a fair price was given, was considered to be a fraud.

*Pinkney*, (Attorney General of U. S.) in reply. 1. The objection as to the want of parties, if a valid one, which is not admitted, ought to have been urged in the court below. If all the necessary parties have not been made, this court may remand the record to have the proper parties added. But the court may presume the legacies have been paid from the lapse of time. It is wholly unnecessary for the legatees to be parties; and if they were parties, no other decree could be made, than would be if they were not parties.

2. As to the record of the proceedings on the bill in 1784, this court may revise the decree on the same evidence which the chancellor had before him, and he might look into the records of his own court, and form his decree accordingly. Here the copy exhibited in the court of chancery was not objected to, of course it was allowed to be considered as evidence, because, if objected to, it might have been easily made evidence. He cited *Carroll et al. Lessee vs. Norwood*, 4 Harr. & M-Hen. 290. Here the proceedings referred to constitute a part of the record before this court, and is not similar to *Norwood vs. Norwood*, where the proceedings had not been exhibited, but were merely referred to. But without these proceedings of 1784, the appellees have no case, because without them, it does not appear that they have a title to the land under any sale. Yet by their answer they have admitted the proceedings as evidence, by not objecting to them, nor exhibiting different proceedings. This court acts here as the chancellor acted in his court, and the same rules of evidence in that court govern in this, and if the proceedings were evidence there, so they will be here.

3. The land in question being an estate in tail in the appellant, it was not liable to sale for debts under the decree of 1784. The debt due to *Lawson* was a mere personal charge on *Samuel Dorsey*, which could not affect the appellant, the heir in tail.

4. The declarations of *Samuel Godman* are evidence. The recital in a deed is evidence against the grantor, and his assigns, not on the principle of notice, but because it contains the declarations of the grantor; and upon the same principle *Godman's* declarations are proof.

*Sheaff and Harper*, with the permission of the court, is

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answer to the new matter urged by the counsel for the Appellant in reply, stated—

1. It has been contended by the appellees, that the legatees under the codicil of *Caleb Dorsey*, the common ancestor, ought to be before the court, because, even if the present suit should be decided in favour of the appellees, yet these legatees may in future assert their claim, and that the court of chancery will not allow the same question to be twice agitated. The appellant objects, that this ought to have been urged in the court below. This objection cannot prevail, as is proved by the authorities, and by the judgment of this court in the case of *Coale et al. vs. Mildred's Adm'r.* (*ante* 273,) where the decree was reversed for want of parties, and yet no objection of that kind was urged below. It is stated that this court may remand the record to have the parties added. This is not admitted by the appellees, because the chancellor may in such case either dismiss the bill, or give leave to amend, in his discretion. He has here exercised this discretion; and there is no instance of reversal for an undue exercise of discretion; this case is still stronger, for here the bill was dismissed, which may well be, for want of parties, the decree, therefore is right, and must be affirmed, and on affirmance cannot be remanded. Again, it is said that the court must presume these legacies are paid from the lapse of time; this cannot be, because, when lapse of time is relied on as evidence of payment, the fact of payment must be alleged. In this case there is no such allegation, on the contrary, the bill seems to imply, that the legatees were not paid.

2. On the subject of the copy of the record in chancery in 1784 being evidence, it is admitted that any court may look into its own records, every court being acquainted with its own records; but when the judgment of an inferior court is revised, the appellate court can, judicially, only know what is thus looked into by the inferior court, to be a record, by the legal evidence of the fact, viz. by a copy under seal. Again, it is said that this copy not having been objected to, is evidence. Not so, because this is only an allegation of the bill, and the same as if copied into it, and because either party may file any paper in chancery, and the court decides, only, on the legal evidence; the contrary in a court of law, where any paper

read in evidence, and not objected to, is considered as admitted; this answers the case of *Carroll et al. Lessee vs. Norwood*. It is not conceded that without the record of 1784 the appellees have no case, because, being the statement of the bill, the complainant is confined to it. And because the bill states the existence of a bill, answer, decree and sale—The answer admits a bill, answer, decree and sale, so far the parties are *not* at issue—The bill states a certain copy, the answer does *not* admit this; but refers to the proceedings in chancery, alleging a different conclusion of the case, *viz.* a ratification. Every necessary allegation must be proved, and if the answer is silent as to it, the course is to except to the answer. Again, if it should be thought that no legal title appeared in the appellees, this consequence follows, that the legal title would still be in the appellant, and that his remedy would not be in equity to vacate the deed, but at law, to recover possession by ejectment.

3. It is understood that the appellant's counsel argued, that this being an estate in tail in the appellant, it was not liable to sale for debts, under the decree in 1784. It is conceded, that the estate of the issue in tail, was not then liable for the debts of the tenant in tail; but this decree was for the payment of the debt of the tenant in fee, who by devise created the estate tail, *viz.* *Caleb Dorsey*, the common ancestor.

4. On the subject of *Godman's* declarations.—The application of the doctrine contended for by the appellant's counsel is disputed by the appellees: Because the reason why the recital in a deed is evidence, is that the deed, being the title of the grantee, he must take the deed as it is, not only the conveying part, but the recital also, he cannot separate the part which is in his favour, from that which operates against him. But the parol declarations of the grantor, made before the title accrued, during its continuance, or after its expiration, stands on different grounds. There is here no evidence of any declarations of *Godman* made at the time of his purchase. The debt to *Lawson* is expressly charged on *Samuel* and *Edward*, generally, by the codicil; and the codicil legacies are specifically charged on the lands devised to *Samuel* and *Edward*. Whence it appears, as the appellees contend, that the lands of *Samuel* were chargeable in the hands of

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the complainant with one half of the debt to *Lawson*, the personal estate being entirely insufficient for debts and legacies, and consequently, that the bill in 1784 was properly filed; and that *Edward Dorsey* acted correctly in admitting the allegations contained in it. Should it be thought that he did not act correctly, still it must be admitted to have been a very doubtful point, in which his conduct may fairly be ascribed to honest mistake, and cannot be regarded as proof of fraud, in which light the argument of the appellant requires it to be viewed. As to the idea of the appellant's counsel, that the debt to *Lawson* was a mere personal charge on *Samuel*, which could not affect the appellant, his heir in tail, it appears to be fallacious in both its parts. The charge was not merely personal, but was a charge on his estate; and it was a debt due from him who created the intail: that is, *Caleb Dorsey*, and therefore binds his lands in the hands of his devisee in tail, or the remainder-man, who equally claims under him by the devise.

BUCHANAN, J. delivered the opinion of the court. This suit appears to have grown out of irregularities practised by those who had the settlement of the estate of *Caleb Dorsey*, but whether by design, misconception, or the common assent of the parties immediately interested, is difficult to determine. No part of the real estate of *Caleb Dorsey* is charged, either by the will or codicil, with the payment of debts, though by the will, all the personal property is, and so much of the personal estate remaining, after the payment of the debts, as should be found not necessary for carrying on certain iron works, is charged with the will legacies. Several specified tracts of land, not including that in dispute, are alone charged with the payment of the legacies raised by the will, but all the lands devised to *Samuel* and *Edward Dorsey*, either by the will or codicil, are charged with the codicil legacies. At the time of executing the will, the purchase from *Lawson* had not been made, from which circumstance, and the provision in the codicil, directing *Samuel* and *Edward Dorsey* to pay the debt due to *Lawson*, it is obvious that *Caleb Dorsey* did not intend that his executors should apply any part of his personal property to the payment of that debt; and if the executors had, after paying all the debts except *Lawson's*,

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applied the residue of the personal estate, with the proceeds of sales of the land directed by the will to be sold for that purpose, to the discharge of the legacies, leaving the debt due to *Lawson* to be paid by *Samuel* and *Edward Dorsey*, they would have acted in conformity with the intentions of the testator; which they may have done, though it nowhere appears. But notwithstanding it seems to have been the intention of *Caleb Dorsey* to make the debt to *Lawson* a personal charge on *Samuel* and *Edward Dorsey*, it was still in law a debt due from him, with which the whole of his estate was chargeable, and it is now not necessary to inquire whether the personal property was exhausted, and so followed up by *Lawson*, as would have enabled him to proceed against the real estate of *Caleb Dorsey* in the hands of *Edward Hill Dorsey*, the appellant. The decree of the court of chancery, subjecting a part of that estate to be sold for the payment of one half of *Lawson's* debt, is in full force, and cannot in this case be impeached by this court; though it is difficult to account for the executors of *Caleb Dorsey* having gone into chancery to procure a sale of the lands, in the hands of *Edward Hill Dorsey*, to discharge the debt due to *Lawson*, without showing what application they had made of the personal estate of *Caleb Dorsey*, or of the money for which the lands, charged by the will with the payment of the will legacies, and the lands and works bought of *Lawson* were sold; nor is it less remarkable that *Edward Dorsey*, then the guardian of *Edward Hill Dorsey*, should have consented to a decree for the sale of the real estate of his ward, without calling upon the executors to show how they had applied the funds which had come into their hands. The whole transaction wants explanation, but is not so marked as to bear the character of fraud. It is stated in the answers in this case, that no part of the money, for which the lands and works bought of *Lawson* were sold, was applied to the payment of *Lawson's* debt, nor is there any proof that it was so applied. *Samuel Dorsey*, who was one of the executors, until the year 1777. when he died, cannot well be supposed to have acquiesced in any scheme to cheat his son; and the will and codicil of *Caleb Dorsey* are referred to by the executors in their bill against *Edward Hill Dorsey*, as exhibits. With a knowledge of the provisions of both of which instruments the chancellor decreed the sale.

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The decision, therefore, of the question in this case, whether *Edward Dorsey* bought the land sold by him as trustee, at his own sale, through the instrumentality of *Samuel Godman*, must be uninfluenced by any thing anterior to the decree of 1784, and must be governed by the other evidence in this cause particularly relating to that transaction.

The testimony of *Brutus Godman* was properly rejected, he had never seen *Edward Dorsey* write, and had no knowledge of his hand-writing; proof, therefore, of the contents of the paper spoken of, was clearly inadmissible. But this court think the chancellor erred in not receiving the declarations of *Samuel Godman*, that he had purchased the land in question for *Edward Dorsey*. The declarations of a man respecting his title, made before he parts with his estate, are evidence against him, and all claiming under him; and the distinction attempted to be taken between the case of a voluntary transfer, and that of a conveyance for a valuable consideration, is not supported. In this case *Godman* was the purchaser at the sale, received a conveyance from *Dorsey*, the trustee, and afterwards reconveyed to him; and it is clear, from the proof in the cause, that his declarations were made between the time of the sale, and the date of his deed to *Dorsey*; they would have been good against him as admissions respecting his title, and are competent evidence against those claiming under him, who stand in his place, and hold the land subject to any imperfection of title which attended it in his hands. But the declarations of *Godman* are not the only evidence that he made the purchase for *Dorsey*. The situation of *Godman* at the time, the proof that he never took possession of the land, entered upon, or exercised any act of ownership over it; and the circumstance that *Taylor's Forest*, which was devised to *Samuel* and *Edward Dorsey*, as tenants in common, had been divided before the sale; that *Edward Dorsey*, who as guardian of *Edward Hill Dorsey*, was in possession at the time of sale of the part sold to *Godman*, never parted with the possession, but immediately after the sale commenced cutting down the wood that stood upon it for the use of his furnace, and continued to cut it until his death, or until all was cut down, are very strong and difficult to be resisted. This court are therefore of opinion, upon the evidence before

them, that *Samuel Godman* did buy the land in question for *Edward Dorsey*, the trustee; and that, on the established principle, that a trustee can never be a purchaser at his own sale, the deeds made in consequence thereof ought to be vacated, (there being no evidence to satisfy the court that *Edward Hill Dorsey*, the only person interested, ever assented to the purchase,) and that the decree of the chancellor ought to be reversed.

The court are also of opinion, that the appellant is liable and ought to pay to the representatives of *Edward Dorsey* the amount paid by him to *Alexander Lawson*, with a commission of five per cent, on the sum for which the land bought by *Edward Norwood* was sold, with other incidental charges, subject to a deduction for the amount of *Edward Norwood's* purchase, and an allowance for interest, as by the account referred to in the bill as an exhibit. But that he is entitled to recover the rents and profits of the land struck off to *Samuel Godman*, which under the facts and circumstances in this case, the court think are equal to the interest of the sum, for which he is so answerable, and that the one is, and ought to be taken as a just and full set off against the other. Upon which principles the court have caused an account to be stated, which exhibits a sum due to the representatives of *Edward Dorsey*, amounting to \$8778 80.

CHASE, Ch. J. was of opinion, that the proceedings in chancery in 1784, on the bill by the executors for the sale of the land in question, were irregular; that the land was devised in tail, and was not liable to the debt for which it was sold. He gave no opinion upon the other questions raised in the case.

THE COURT—Decreed, “that the decree of the court of chancery passed in this cause, be and the same is reversed.” Decreed also, “that the sales to *Samuel Godman* of parts of the tract of land called *Taylor's Forest*, lying in *Baltimore* county, be and are hereby annulled and declared to be void, and that the deeds executed in consequence thereof, that is to say, the deed from *Edward Dorsey* to *Samuel Godman*, bearing date the 1st of March 1785, and the deed from *Samuel Godman*, to *Edward Dorsey* for the said land, bearing date the 12th of December in the same

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year, be and they are hereby vacated, and declared to be null and void." Decreed also, "that the appellant, *Edward Hill Dorsey*, bring and pay into the court of chancery, for the use of the representatives of the said *Edward Dorsey*, the sum of \$8,778 80, which sum is ascertained to be due to them by the account hereunto annexed; and that when the said sum of money shall be so paid and lodged in the court of chancery, and not before, the heirs of *Edward Dorsey* deliver to the appellant full and peaceable possession of all that part of the land called *Taylor's Forest*, which is included in the deeds before mentioned." Decreed also, "that the appellees pay to the appellant the costs which have accrued in this court, and in the court of chancery, and by him expended and paid," and, "that the chancellor make and pass all such orders and decrees as shall or may be necessary to carry this decree into full and complete effect."

DECREE REVERSED, &amp;c.

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P C being the agent of P S, did as such contract with W C to sell to him a house and lot for \$190, and an agreement in writing to that effect was entered into by P S with W C, and that on payment of the money a deed should be executed to W C by P S. The amount of the purchase money was paid by W C to P C, who, before the payment of the money to him stated to W C, that if any difficulties should arise about the title to the lot, he was good for the money, and would return it to him. In an action for money had and received, brought by W C against P C, evidence was given that a claim had been made to a part of the lot, and it had been actually enclosed with a fence by H O; and that no deed for the lot had ever been made or tendered by P S, or any other person, to W C. The court refused to direct the jury, that no parol evidence could be received to show that a claim had been made to any part of the lot, and that it had been enclosed; or to direct them that the plaintiff was not entitled to recover.

APPEAL from *Baltimore County Court*. *Assumpsit* for money had and received. The general issue was pleaded. And at the trial the plaintiff, (now appellee,) gave in evidence, that the testator of the defendant, (the appellant,) being the son-in-law and agent of a certain *Philip Staylor*, did as such contract and agree with the plaintiff to sell him a certain lot of ground in *Baltimore* for the sum of \$190. And also gave in evidence the following agreement executed by *Philip Staylor*: "This indenture made the 8th day of May, in the year of our Lord one thousand eight hundred and four, between *Philip Staylor*, of *Baltimore* county, and *William Creek*, of the same county. The said *Staylor* doth sell a house and lot to the said *William Creek*, his heirs, executors, administrators or assigns, for the consideration of the sum of one hundred and ninety dollars, to be paid to the said *Philip Staylor*, or his heirs, executors, administrators or assigns. The said *Philip Staylor*, or his heirs, doth agree to give the said *William Creek*, or

his heirs, executors, administrators or assigns, for the consideration of the sum of one hundred and ninety dollars, to be paid to the said *Philip Staylor*, or his heirs, executors, administrators or assigns. The said *Philip Staylor*, or his heirs, doth agree to give the said *William Creek*, or

his heirs, a deed at the last payment of ninety dollars, which is to be paid the first day of February 1805.

his

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mark and (Seal.)

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Also a receipt endorsed on the said contract, dated the 8th of May 1804, signed by the defendant's testator, for \$100. Also a note executed by the plaintiff to the defendant's testator, on the 8th of May 1804, for \$90, payable ten months after its date. Also receipts thereon, endorsed by the defendant's testator, for the amount of said note. The plaintiff further gave in evidence, that before the payment of the money mentioned in the first recited receipt, and before the execution of the above note of hand, the plaintiff told the defendant's testator, that he the plaintiff was a coloured man, and not acquainted with titles to land. Whereupon the defendant's testator, told him the plaintiff, that if any difficulties should arise about the title to the lot, that he was good for the money, and would return the same to the plaintiff. Upon which the money was paid to the defendant's testator, and the said note of hand was signed. The plaintiff further gave in evidence, that a claim had been made to a part of the said lot, and the same had actually been enclosed with a fence, by a certain *Robert Oliver*; and also that no deed for the lot had ever been made or tendered by *Philip Staylor*, or any other person, to the plaintiff. The defendant then prayed the court to direct the jury, that no parol evidence could be received to show that a claim had been made to any part of the lot, and that the same had been inclosed; and also further prayed the court to direct the jury, that the plaintiff was not entitled to recover in this action. But the Court, [*Nicholson*, Ch. J.] refused to give either of the directions. The defendant excepted; and the verdict and judgment being against him, he appealed to this court,

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, and JOHNSON, J.

*Glenn*, for the Appellant. There are several objections in point of law to the right of the appellee to recover the sum claimed from the appellant.

1. There was a voluntary surrender on the part of the appellee, and no legal eviction; and there is no case in

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the books where a similar recovery to the present has been had, without a regular proceeding at law against the premises, and a recovery thereupon. Were the law otherwise, it would be the most easy thing in the world for a man who had made a bad bargain, to permit a claim to be set up against the property purchased, and a surrender *by coven* of the premises to the party claiming. If an ejectment had been instituted against *Creek*, and a recovery of the lot had ensued, then an action for money had and received might have been maintained against *Staylor*, the bargainor, but not even in that case against *Cloherty*, who had merely received the money for another, and had afterwards parted with it. *Crips vs. Reade*, 6 T. R. 606.

2. The appellee cannot recover in this action, because no notice of any claim being set up to the property in question was given by him to either *Staylor*, the bargainor, or to *Cloherty*, the testator, and consequently, as neither of them was notified of the claim, neither of them had an opportunity of defending the property against the claim thus set up; and indeed, for aught that appears, the person who has fenced in a part of the lot had no legal title to the same, and unless that is made manifest to the court, it cannot be conceived how the appellee can pretend to claim to have the money paid by him refunded. If A sells a lot to B, and makes a general warrantie,—in order to maintain an action on the warrantie, B must show a legal eviction by due course of law; or at least notice must be given to A, with a request to defend the lot against a claim made against it. To support this, he cited *Harr. and But. Co. Lit. tit. Warrantie*, 365.

3. Before the action for money had and received was instituted, the plaintiff below ought to have made an offer to surrender to *Staylor*, the seller of the lot, that part of it which had not been taken away by any claim whatever, as he could not, (as he has done in this case,) go for the whole amount of the purchase money without such surrender or offer. *Weston vs. Downes*, 3 Doug. 23. *Towers vs. Barrett*, 1 T. R. 133. *Stratton vs. Rastall*, 2 T. R. 366.

4. The action for money had and received is not the proper form of action, as it was a special understanding, and therefore ought to have been specially set out. *Esp. N. P.* 138, 9. The reason in equity why such a claim as this made by the appellee against the appellant, is resist-

ed, is because *Cloherly*, the testator, had parted with all the money he had received for *Staylor* from the appellee, long before the institution of this suit; and it is apprehended that *Staylor* is the person to whom the appellee should look, if indeed he has a remedy against any person.

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*Magruder*, for the Appellee. The defendant's testator sold to the plaintiff a lot of ground, and agreed, in case of any difficulty with respect to the title, to refund the money received by him on account thereof. It is not stated in the bill of exceptions that the defendant's testator, who it appears was the agent of his father-in-law, had, or that his executor had, paid over the money when this suit was instituted; and after the contract with the plaintiff, while any doubt with respect to the goodness of the title existed, he was bound to retain it in his hands. It appears too, that in order to get the money, he engaged to be personally responsible. The objection, therefore, that the defendant's testator was only an agent, cannot be sustained.

The counsel for the appellant contends, that there ought to have been an eviction, and the defendant's testator, or his constituent, ought to have had notice of the adverse claim, and an opportunity of defending the title in an action of ejectment. But it does not appear that the plaintiff was ever in possession of the lot, or able to get possession of it. The evidence is, that *Oliver* was in possession of part, and had actually enclosed it; and upon the statement of facts in the bill of exceptions, it must be presumed that he was in the possession at the time of the sale. There could then be no eviction of the plaintiff, and for want of title, (no deed having been executed or tendered to him,) he could not institute a suit for recovery of the lot. The defendant's testator could not, or would not, give possession to the plaintiff, the latter therefore had a right to disaffirm the contract, and sue for the money paid by him. The counsel for the appellant says, that the plaintiff ought to have made, or offered to make, a surrender of the property to the defendant's testator; but before this can be necessary, it ought to have been proved by him, and the bill of exceptions should have stated that the plaintiff had obtained the possession. This not being stated, cannot be presumed. The action for money had and received is the proper and usual form in which the purchase money is re-

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covered back in case of any defect of title, or disaffirmance of a contract. The first branch of the defendant's application, in the court below, was certainly improper. None other than parol evidence could be offered of the adverse claim. The second application to the court, was to instruct the jury, "that the plaintiff was not entitled to recover *in this action*." It is not stated that the whole of the testimony, adduced by the plaintiff in support of his action, is set forth in the bill of exceptions, and the defendant does not pray the court to instruct the jury that the evidence therein mentioned was not sufficient to maintain the action. This court cannot reverse the judgment, unless they are of opinion, that the testimony stated in the exception was sufficient to defeat the plaintiff *in this action*, notwithstanding any further proof that he might be able to adduce. There is nothing in the record to show that proof was not offered by the plaintiff below of an eviction, after due notice to the defendant's testator of the adverse claim. But from the expressions of the bill of exceptions, we are led to infer, that the counsel for the defendant contended, that the testimony stated in the exceptions precluded the possibility of the plaintiff's recovery "in this action," whatever testimony he might be able to offer, that the objection went entirely to the form of action, or was grounded upon the conclusive testimony offered by the defendant.

JUDGMENT AFFIRMED.

DECEMBER.

SAUNDERS, Terretenant of DULEY, vs. WEBSTER.

J W obtained a judgment against J D, and issued a *scire facias* thereon against R S, as his terretenant, who pleaded that J D was not seized of the land of which he is returned tenant at the time of the judgment—Held, that the *scire facias* could not be supported without producing a grant from the proprietary for the land, or laying a foundation for presuming one. But that a grant for the land, with the deed offered in evidence from J D to R S, and the parol evidence, that J D was, and had been, in possession of the land for nine years before his deed to R S, would be sufficient to support the issue for the plaintiff

APPEAL from Harford County Court. This was a writ of *scire facias* issued against the defendant, (now appellant,) as terretenant of *Duley*, on a judgment rendered in that court against *Duley*. The defendant pleaded, that *Duley*, was not seized of the lands, &c. at the time of the rendition of the judgment. At the trial, to prove a seisin of the lands in dispute, which was part of a tract called *Coleraine*, in *Duley*, the plaintiff, (now appellee,) offered in evidence a deed from *Duley*, to the defendant, dated the 16th of June 1803, for part of a tract called *William's Ridge*, containing 100 perches, and for ten acres, part of

the deed offered in evidence from J D to R S, and the parol evidence, that J D was, and had been, in possession of the land for nine years before his deed to R S, would be sufficient to support the issue for the plaintiff

a tract called *Coleraine*. He also offered parol evidence to prove that *James Duley* was in possession of the said land, and had been in possession of it for nine years before the execution of said deed. Upon this evidence he prayed the opinion of the court, that it might and ought to be presumed that *Duley* was, at the time of the said conveyance, legally seized of the said ten acres, unless the defendant could show that he held said ten acres by another title than that derived from *Duley*. Of this opinion the Court [*Nicholson*, Ch. J.] was, and so directed the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

1813.

  
 Saunders  
 vs  
 Webster

The cause was argued before CHASE, Ch. J. and BUCHANAN, and EARLE, J. by

*T. Buchanan*, for the Appellant.

No Counsel appeared for the Appellee.

CHASE, Ch. J. delivered the opinion of the court. The plaintiff cannot support the *scire facias* against the terretenant, without producing a grant from the proprietary for the tract of land called *Coleraine*, or laying a sufficient foundation for presuming one; for without such grant *Duley* could not have been seized of the ten acres of land, at the time of the obtention of the judgment on which the *scire facias* was sued out, nor could the land have been liable to execution thereon—the possession of the ten acres being by intrusion on the proprietary.

The court are also of opinion, that the grant, with the evidence produced, would have been sufficient to have supported the issue for the plaintiff.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

1819.

O'BRIEN *et ux.* vs. HARDY.O'Brien  
vs.  
Hardy

APPEAL from *Harford* County Court. It was an action of replevin for slaves, brought by the plaintiffs, (now appellants,) on the 20th of March 1807. The defendant, (now appellee,) pleaded—1. Property in Defendant. 2. *Non cepit infra tres annos.* 3. *Actio non accrevit infra tres annos.* 4. That on the 13th September 1803, *Charles O'Brien*, one of the plaintiffs, after his marriage with *Martha*, the other plaintiff, instituted his action of replevin against the defendant, to recover the same property mentioned in the declaration in this cause, and in which said action it was, at March term 1807, adjudged, on certain demurrers entered to the plaintiffs' replications, that the said *Charles* should take nothing by his writ, &c. and that the defendant should have a return of the said property, to be detained to him irrepledgable, for ever, &c. 5. The same suit pleaded in another form. The plaintiffs demurred to the 4th and 5th pleas, and there were joiners in demurrer, &c. There was a general replication to the first plea, and issue was joined. To the 2d and 3d pleas the plaintiffs replied, that the said *Martha* was a minor, until and after the day of her marriage with the said *Charles*, &c. The county court gave judgment upon the demurrers to the fourth and fifth pleas, for the defendant. From which judgment the plaintiffs appealed to this court.

In an action of replevin by husband and wife, the defendant pleaded five pleas—one, property in himself—two, the act of limitations, and two others, a former action for the same cause of action, &c. On the first plea issue was joined; to the second and third pleas there were replications that the wife was a minor until after her marriage, &c. but there were no issues joined, upon them. And to the fourth and fifth pleas, there were general demurrers, upon which judgment was rendered for the defendant. No disposition was made of the issue in fact on the first plea—*Held*, that where the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is overruled, judgment of *nil capiat* shall be entered, although there may be also one or more issues in fact,

The cause was argued before CHASE, Ch. J. and BUCHANAN, and EARLE, J. by

*Martin*, for the Appellants, who stated that nothing was done to the issue joined to the first plea; and to the 2d and 3d pleas, and replications thereto, no issues, either in law or fact, were joined. That there remained an issue unacted upon, which was error, as every issue must be disposed of in some way.

No Counsel appeared for the Appellee.

THE COURT cited *Lawe vs. King*, 1 *Saund.* 80, (n 1.) and *Cooke v. Sayer*, 2 *Burr.* 753, where it is laid down, that where the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is overruled, judgment of *nil capiat* shall be entered, notwithstanding there may be also one or more issues in fact; because upon

the whole it appears, that the plaintiff had no cause of action. If the demurrers are decided *before* the issues are tried, they shall not be tried; and if *after* the trial, it will make no difference, for in each case judgment of *nil capiat* shall be given against the plaintiff.

JUDGMENT AFFIRMED.

GREENWOOD VS. STONER.

DECEMBER,

APPEAL from *Frederick County Court*. The cause was argued in this court before *Chase, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J.* The case sufficiently appears in the argument of the appellant's counsel.

The county court has no power, under the act of 1785, ch. 49, or any other law, to order a public road to be opened

*Taney*, for the Appellant, stated, that *John Stoner*, (the appellee,) petitioned for the road described in his petition, which passes through the land of *Greenwood*, (the appellant.) The court granted the road. *Greenwood* has appealed from the decision of the county court, to this court, and now prays that the same may be reversed, for the following reasons:

1. Because the court had not the power to grant the road in question.

2. Because it is unnecessarily injurious to *Greenwood*. *First*. The power of granting private roads or ways is given to the county courts by the act of 1785, *ch. 49*, and they have no further power on this subject, than that given by this law. The power given to the court in the *third* section, is to grant *such* private road or way as is mentioned in the second section; that is, a road "*to and from the farm and plantation*" of the petitioner, "*to places of public worship*," and mills, &c. In other words, the courts have the power of granting to any individual a convenient outlet from his *farm, or plantation, to other places*, but not the power to open a road for the public convenience, or the convenience of a neighbourhood. The road applied for in the petition, is not a road "*to and from his farm or plantation*," to a place of public worship, or mill, or market town, or public ferry, or court-house—but "*a road from Paul Hawk's church to the petitioner's mill, and from his mill to intersect the public road leading from Liberty-town to Baltimore*." The petitioner therefore does not bring his case within the act of assembly. It does not ap-

1813.

Greenwood  
vs  
Stoller

pear from the petition that the road in question touches any farm or plantation of the petitioner. It passes his mill. Any other person, or he himself, would have been entitled, under the law, to a way "*to and from his farm and plantation*" to his mill; but this is for the convenience of the owners of the farms or plantations, not of the owner of the mill. It is their privilege, not his. The power is not given to the court to grant to the owners of mills convenient roads to and from their mills, to churches or other places. The road in question is laid out from a church to a main road. The church, at which it begins, is proved in the record not to be the one frequented by the petitioner, and to belong to a different denomination of christians. After leaving the church nearly two-thirds of a mile, this *private way* enters the *public road* leading from *Frederick-town* to *York-town*, and runs to the middle thereof. It runs with this public road 19 perches, then passes over to the other side, and reaches the petitioner's mill, more than seven and a half miles distant from the church at which it set out; passes the petitioner's mill, and after running two miles (wanting 46 perches,) further, and passing two other mills, it reaches the land of *Greenwood*, the appellant; then goes on the public road from *Liberty-town* to *Baltimore*, distant about four miles, and three quarters of a mile from the petitioner's mill, and passing three more mills in its way. The whole length of the road is 3979 $\frac{1}{4}$  perches, more than twelve and a quarter miles. It passes six mills, including the petitioner's, crosses the great road from *Frederick-town* to *York-town*, and runs with it part of the way. Such is the road asked for in the petition, and granted by the court; a road which it might be proper for the legislature by law to open, but which is believed not to be such "*a private road or way to and from a farm or plantation,*" as the county court are empowered by law to grant.

*Second.* To prove that the road granted by the court was unnecessarily injurious to the petitioner, he referred to the depositions of the witnesses which appeared in the record, but which it is unnecessary to notice here. And he contended, that the petition itself proved conclusively that the road in question was intended, and was to be, a public neighbourhood road, and not a private road or way for the petitioner's own use. That it stated that "*the pe-*

tionner, with a number of others, labour under great inconvenience for the want of this road." The neighbourhood inconvenience, therefore, was the foundation of the application to the court, and for the general benefit of the neighbourhood the road was applied for.

No counsel argued for the appellee.

JUDGMENT REVERSED.

1813.

Hollins  
vs  
Barney

HOLLINS use of THE NEW YORK INSURANCE COMPANY, DECEMBER.  
vs. BARNEY

APPEAL from *Baltimore County Court*. This was an action of *assumpsit*, and the declaration contained the usual money counts. The general issue was pleaded; and at the trial, the plaintiff, (now appellant,) gave in evidence, an admission of the defendant, (the appellee,) under his hand, that he had received on the 6th of April 1800, the sum of 22,138 livres, 5 sous, and 11 deniers, current money of *France*, equal to the sum of \$4,025 14 cents current money of the *United States*, of the money of the plaintiff, arising from the sale of the cargo of a vessel called *The Patapsco*, which cargo belonged to the plaintiff, and had been captured and carried to *France*, and was there claimed by the defendant, and recovered and sold by him for the said sum. The defendant then read in evidence the following letter from the plaintiff to him, dated the 24th of December 1802: "Inclosed is my account current with you, balance in my favour \$2600 52, without interest—nor have I charged you with the ship *Patapsco's* cargo received by you in *France*, which by your account current appears to be 22,138 5 11, or \$4025 14, for two reasons—first, because the sum does not agree with my expectations as to the amount; secondly, the property was insured in *New York*, and abandoned to the underwriters, who paid me in full. Perhaps, however, they may appoint me their agent, and in that case you shall be informed. You will perceive also that no credit is given for what you are pleased to call my proportion of *Fenwick's* judgment, 1272 livres, or \$1766 10, being at present totally dark on that subject. At the foot of the account two items are put down, but not the amounts. The first for want of information, and so of the second—which will depend upon the amount awarded in *London*. Some other entries may

In an action of *assumpsit* brought by J. H. for the use of N. Y. against J. B. for a sum of money stated to be received for him by J. B. from the sale of the cargo of a vessel belonging to J. H. which had been captured, &c.—*Held*, that J. H. having caused the cargo to be insured by N. Y. (for whose use the action was brought,) and after the capture having abandoned the cargo to the insurers, and having been paid by them, the action could not be maintained.

1813.

Mudd  
vs  
Mudd

occur, both Dr. and Cr. before our accounts are finally closed; if so, you shall be informed." The defendant read this letter to prove, that before the time of bringing this action, the plaintiff had caused himself to be insured on the said cargo by *The New York Insurance Company*, named in the title of this cause as the persons for whose use the action was brought, and after the said capture, had abandoned the cargo to the said insurers, and had been by them paid for it. The defendant then prayed the opinion of the court, and their direction to the jury, that upon the said evidence the plaintiff was not entitled to recover. This direction the court, [Hollingsworth, A. J.,] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, EARLE, and JOHNSON, J.

*Harper*, for the Appellant.

*Martin* and *Stephen*, for the Appellee, contended, that the action was erroneously brought, that it should have been brought in the name of *The New York Insurance Company*, and not in the name of *Hollins*, (who had been paid,) for their use. They referred to *Marsh. 519. ch. 14, s 4. Barnes vs. Blackiston, et al. 2 Harr. & Johns. 376;* and *The Chesapeake Insurance Company vs. Stark, 6 Cranch, 268.*

JUDGMENT AFFIRMED.

DECEMBER.

MUDD VS. MUDD.

In *assumpsit* for work and labour, &c. by P against D, it was proved that P and D agreed that P should build a house for D, and that after the house was built, if D should disagree as to P's bill, then two workmen should be selected to value the work. The house being built, two persons were selected by P and D, who measured and valued the work. The Court refused to direct the jury, that inasmuch as a special contract was proved, the action of *assumpsit* could not be supported, but that an action on the special contract was the proper remedy.

APPEAL from *Charles County Court*. This was an action of *assumpsit* for work and labour done and performed, and for a *quantum meruit* for work and labour, &c. The general issue was pleaded. At the trial the plaintiff, (now appellee,) swore one *Richard V. Smith*, a legal and competent witness, who deposed, that previous to the institution of this suit the plaintiff, and the defendant, (now ap-

pellant,) agreed that the plaintiff should build for the defendant a house, that after the house was built, if the defendant should disagree as to the plaintiff's bill, that then two workmen should be selected, one by each party, who should value the work. And he further gave in evidence, by a certain *Henry Green*, jun. and *Edward Boone*, legal and competent witnesses and workmen, that they, at the request of the plaintiff and defendant, on the 1st of January 1809, measured and valued the work done by the plaintiff for the defendant, under the contract as stated by *Smith*, the witness; and that they estimated it at \$205 24. It was admitted that the house was finished before the institution of the suit. The defendant then prayed the court to direct the jury, that inasmuch as a special contract was proved between the parties, the action of *assumpsit* could not be supported; but that an action on the special contract was the proper remedy. This direction the Court, [*Key*, and *Clarke*, A. J.] refused to give. The defendant excepted; and the verdict being against him, he appealed to this court.

1813.

Gibson  
vs  
Kephart

The cause was argued before BUCHANAN, NICHOLSON, EARLE, and JOHNSON, J. by

*T. Buchanan*, for the Appellant.

No Counsel appeared for the Appellee.

JUDGMENT AFFIRMED.

## GIBSON VS. KEPHART.

DECEMBER.

APPEAL from *Frederick County Court*. Trespass for taking and carrying away rails. The defendant, (now appellee,) pleaded, 1. *Non cul.* 2. Property in the rails; and 3. A license to take them away. General replications, and issues joined. At the trial the plaintiff offered in evidence a deed, dated the 20th September 1806, from the defendant to himself, for a parcel of land called the *Resurvey on Brother's Agreement*; and proved that the fence rails, to recover damages for the taking of which this suit was brought, were on the land at the time of executing the

K executed to G a deed for a parcel of land, on which were a quantity of fence rails, which K, after the deed, removed. G brought an action of trespass against K for taking and carrying away the fence rails, and K defended himself under his plea of a license to take them away, and proved at the trial, that in a conversation between him and G, before the deed was executed, G informed him that he would afterwards give him leave to move the rails whenever he should request him. Such testimony held to be admissible.

ed, G informed him that he would afterwards give him leave to move the rails whenever he should request him. Such testimony held to be admissible.

1813.

Gibson  
vs  
Sephart

deed by the defendant, and formed a line of fence enclosing a part of the land, and that the fence rails were removed by the order of the defendant about six months after the execution of the deed, and before the bringing of this suit. The defendant then offered in evidence, to support the issue joined on the third plea, that a settlement of lines took place between the plaintiff and defendant some time before the execution of the said deed, and that upon such settlement a considerable part of a post and rail fence, put up by the plaintiff, appeared to be on the defendant's land. That the land, on which the greater part of the post and rail fence stood on the settlement of lines, was, together with some other lands of the defendant, conveyed by the said deed; and on the lands so conveyed the fence stood, for the taking away of which this suit was brought, and which fence had been put there by the defendant. That about five or six pannels of the fence, put up as aforesaid by the plaintiff, stood on the land of the defendant, and was not conveyed in the said deed. The plaintiff further offered in evidence, that subsequent to the deed already offered in evidence, in a conversation between the plaintiff and defendant, the defendant said to the plaintiff, What have you left that piece of fence standing for? (alluding to the five or six pannels of post and rail fence which still stood on the defendant's land, and which had been put there by the plaintiff.) That the plaintiff said, for you Sir. The defendant then said, you know how the bargain was, that each of us was to have our own fence rails. To which the plaintiff made no reply, but thereupon directed the witness to remove the said piece of post and rail fence from off defendant's land, to his the plaintiff's land; which was accordingly done. That the conversation above mentioned took place about one month after the fence rails, for the taking of which this suit was brought, had been removed by the defendant's order. That at the time of this conversation, the plaintiff knew that the rails for which the suit was brought, had been taken away by the defendant, and the place from which they were removed was not more than six or seven perches distant from the place where this conversation took place. The defendant then offered to prove, by a competent witness, that in a conversation between the plaintiff and defendant; before the execution of the deed

aforesaid, the plaintiff had told the defendant that he would afterwards give him leave to move the rails in question whenever he should request him. The plaintiff objected to this testimony, and prayed that the same might not go to the jury. But the Court, [Shriver, A. J.] was of opinion, that the same might be offered to the jury, and did accordingly suffer the same to go to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J. by

Brooke, for the Appellant; and by  
Taney, for the Appellee.

JUDGMENT AFFIRMED.

SCOTT VS. LANCASTER.

DECEMBER.

APPEAL from Charles County Court. The plaintiff below, (now appellant,) brought an action of *assumpsit* against the defendant, (the appellee.) The declaration contained three counts—1. That the defendant on the 25th of May 1804, at, &c. made his certain note in writing, his own proper hand-writing being thereto signed, bearing date the same day and year aforesaid, and thereby promised and agreed to pay to the plaintiff the amount of a certain arbitration bond assigned by a certain *B. Reeder*, and accepted by the defendant, which said bond and award was under the hands and seals of a certain *B. Dyson*, and *B. Douglass*, and also agreed to pay to the plaintiff such balance of a certain *J. Hyndman's* open account, as should appear due—and the plaintiff avers, that the said amount of the said arbitration bond, so assigned and accepted as aforesaid, was £31, and that the said balance, so said to be due upon open account, was £14 2 4. And the plaintiff further says, that the defendant then and there delivered the said note to him the plaintiff, whereby and by reason whereof the defendant became liable to pay to the plaintiff the several amounts before stated, making a total amount of £45 2 4; and the defendant, in consideration thereof, afterwards, on, &c. at, &c. undertook and promised to the plaintiff to pay him the said sum of £45 2 4, when he should be

In *assumpsit* by P against D, on a note in writing, by which D promised to pay to P the amount of an arbitration bond assigned to him by B, and accepted by D, and also to pay to P such balance of J's open account as should appear to be due, with averments as to the amount of those respective claims—D pleaded *non assumpsit*, and the act of limitations, to which issues were joined—and there was a verdict for P on the first issue, and damages assessed, and no disposition made of the other issues. On this verdict judgment was entered for P.

1813.

Scott  
vs  
Lancaster

thereunto afterwards required. 2. *Insimul computassent*. 3. That afterwards, to wit, on the 6th day of September 1790, the defendant being indebted unto *B. Reeder*, it was then and there agreed that a certain *B. Dyson* and *B. Douglass*, of, &c. should settle and adjust the disputes, lying in accounts, between them; and ascertain the balance that might be found due; and upon such reference and settlement there was found and ascertained to be due, and so awarded under the hands and seals of said *Dyson* and *Douglass*, the sum of £33 4 9 current money, from the defendant to the said *B. Reeder*. And whereas, also, afterwards, to wit, on the 4th day of December 1790, the said *B. Reeder*, for value received, assigned the amount of said award to *A. Crawford*, and then and there directed the defendant to pay the amount thereof to *A. Crawford*, or order, and on the said day and year, the defendant thereupon accepted to pay by his acceptance in writing the sum of £31, on account of the same, on or by March, in the year 1791. And whereas afterwards, to wit, on the 3d day of February 1804, *A. Crawford* having assigned the said award and acceptance, and the money thereon due, unto *J. Hyndman*, and *J. Hyndman* having also a claim on account against the defendant, amounting to the sum of £10 2 4, and *Hyndman* being also indebted in a large sum of money unto the plaintiff, he then and there, to wit, on, &c. at, &c. by his written assignment under his hand and seal, for value received, and in consideration of the said sum of money so due from him to the plaintiff, did transfer and assign unto the plaintiff all the debts, dues, claims and accounts, which he had against the defendant, whether on open account, bond, arbitration bond, or bonds given or assigned to him *Hyndman*, or in any other manner whatsoever; of all which said several assignments the defendant afterwards, to wit, on, &c. at, &c. had notice. By reason whereof, and in consideration of the said several assignments, the defendant, when thereof notified, and requested to pay the same by the plaintiff, to wit, on the 25th day of May 1804, according to the tenor and effect of the said assignment, did by his certain note and assumption in writing, (his own proper hand-writing being thereto subscribed,) on the back of the said assignment, accept the same, and agree to pay to the plaintiff the amount of the said arbitration bond, (to wit, the said

award,) assigned by *B. Reeder*, and accepted by him the defendant, which said bond and award was under the seals of *B. Dyson* and *B. Douglass*, and also such balance of *J. Hyndman's* open account as might appear due; and then and there delivered the said note or assumption in writing, on the back of said assignment, to the plaintiff. And the plaintiff in fact saith, that the arbitration bond, and the bond and award mentioned and described in the said note, and the assignment, and acceptance thereof, mentioned in said note, and the award herein first before mentioned, and the assignment thereof, and the acceptance thereof by the defendant as herein first above mentioned, are one and the same award, assignment and acceptance, and not different; and that the amount of said acceptance of the defendant, and the money due thereon from the defendant, is the said above mentioned sum of £31; and that the balance of *J. Hyndman's* open account, due to *Hyndman* from the defendant, amounts to the sum of £10 2 4; of all which the defendant afterwards, to wit, on, &c. at, &c. had notice. By reason whereof, and also by force of the statute in such cases made and provided, the defendant became liable to pay to the plaintiff the said several sums of money, to wit, the sum of £31, and the sum of £10 2 4; and being so liable, in consideration thereof, afterwards, to wit, on, &c. at, &c. undertook, and upon himself assumed, and to the plaintiff then and there faithfully promised, that he the defendant the said several sums would well and truly pay and satisfy, whenever he the defendant should be thereunto afterwards required. Nevertheless, &c. The defendant pleaded *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos*. To which there were the general replications, and issues were joined. Verdict upon the *first issue* for the plaintiff, and damages assessed to £83 3 9 current money. The following points were saved for the court's opinion, viz. 1. That there was no consideration for the assumption laid in the plaintiff's declaration. 2. That the promise of the defendant, as stated in said declaration, was *nudum pactum*. 3. That the declaration of the plaintiff states no legal cause of action, nor any lawful consideration for the promise therein stated,

The County Court gave judgment on the *points saved* for the defendant; and the plaintiff was nonsuited. He appealed to this court.

1813.

Scout  
vs  
Lancaster

1813.

Bradford  
vs  
M'Comas

The cause was argued before CHASE, Ch. J. and RYCHANAN, NICHOLSON, EARLE, and JOHNSON, J. by

*Magruder*, for the Appellant; and by  
*W. Dorsey*, for the Appellee.

The appellee's counsel, without examining the points saved, contended that no judgment could be rendered in favour of the plaintiff on the verdict; because the defendant below pleaded three pleas, on all of which issues were joined, and the jury had only found a verdict on the issue of *non assumpsit*, without having passed on the other issues.

## JUDGMENT REVERSED.

And judgment entered on the verdict for the damages laid in the declaration, and costs, to be released on payment of the sum assessed by the jury, with interest and costs.

## DECEMBER.

BRADFORD'S LESSEE vs. M'COMAS, *et al.*M'COMAS *et al.* vs. BRADFORD'S LESSEE.

Copies of original leases granted by the agents of the Proprietary, remaining in the auditor's office, with the affidavit of the Auditor-general, stating that they were true copies taken from the originals, made before a justice of the peace, with a certificate of the clerk of the county court that such person was a justice, &c.—*Held* to be competent evidence.

CROSS APPEALS from *Harford County Court*. Ejectment for two tracts of land, one called *Ward's Purchase*, and the other *Lee's Adventure*, brought in the name of *Samuel Bradford's Lessee*, for the use of *William M'Comas*. The defendants took defence for *Belguard and Security*, two tracts located by them on the plots returned in the cause.

1. At the trial, the plaintiff offered to read in evidence certain papers, purporting to be copies of original leases granted by the agents of the Lord Proprietary, and remaining amongst the papers in the auditor's office at the

The Proprietary, by his agent, in 1744, leased to W F, for 99 years, a parcel of land called L A, being part of his lordship's reserved manors. W F, with the consent of the agent, assigned the lease to J L, who by deed in 1766 conveyed his interest to W M, who in 1794 executed a bond of covenancy to N M, conditioned for the conveyance of one half of a tract of land called G. In May 1789 W M had surveyed for him a parcel of reserve land, and called it G, which in January 1797 he assigned to N M, and in February 1797 N M assigned to T O, who as assignee, in April 1797 had resurveyed L A, so leased to W F, and called it B G, being the same land before surveyed for W M, and called G, for which the purchase money was paid to the treasurer in November 1797, and a patent thereon issued to T O in January 1800. T O, in August 1800, conveyed the same land to N M—*Held*, that the leasehold interest subsisted and remained unextinguished and was not merged in the freehold by the patent to T O.

The Proprietary, by his agent in 1742 leased to J W for 99 years, a parcel of land called W P, being part of one of his lordship's reserved manors. The administrator of J W in 1747 assigned the lease, with the approbation of the agent, to D M, who by his will in 1765 devised the land to be equally divided between his sons D and J. These two sons, being in possession, conveyed their interest one of them in 1766, and the other in 1774, to W M, but the deeds were not recorded within the time prescribed by law. W M, under those deeds, entered into possession, and held it until 1794, when he made a contract with N M respecting the same—*Held*, that the above facts laid a sufficient foundation for the jury to presume good and valid deeds from D and J, to W M, of said land, although it appeared that there had been deeds executed, and not properly recorded.

city of *Annapolis*, viz. One dated the 1st of September 1742, made to *John Ward*, of *Ward's Purchase*, for 99 years, at an annual rent of £1 0 1½ sterling. The other dated the 16th of March 1744, made to *William Few*, of *Lee's Adventure*, for 99 years, at an annual rent of £1 4 5 sterling. He also, to prove the same to be true copies from the original leases in the auditor's office, offered to read in evidence affidavits endorsed on each of said copies, made by *Robert Denny*, esquire, the auditor general, taken before *Joseph Sands*, esquire, a justice of the peace of *Anne-Arundel* county, and duly certified by the clerk of the county court of said county. To the reading of these copies the defendants objected as not being competent testimony for the plaintiff. But the Court, [*Nicholson*, Ch. J.] was of opinion, and so directed the jury, that said copies were competent evidence for the plaintiff, and permitted them to be read to the jury. The defendants excepted.

2. The plaintiff then read in evidence a deed from *John Lyon* to *William M. Comas*, (the person for whose use the suit was brought,) dated the 14th of October 1766, reciting the lease of the 16th of March 1744, from *Benjamin Tasker*, (agent and receiver-general of the Proprietary,) to *William Few*, for 244 acres of land, part of *Lee's Adventure*, and that the said lease was on the 17th of June 1749, assigned to the said *John Lyon* by the said *William Few*, by consent and approbation of his Lordship's agent and receiver-general; and granting, in consideration of £150 paid to said *Lyon*, unto the said *M. Comas*, the said parcel of land, &c. for and during the residue of the term of 99 years which was to come, &c. The defendants then read in evidence a bond of conveyance from the said *William M. Comas* to *Nicholas D. M. Comas*, one of the defendants, dated the 11th of October 1794, in the penalty of £1500, and conditioned "that if the above bound *William M. Comas*, his heirs, &c. shall well and truly make over and convey, by good and sufficient deed in fee simple, the one half of 250 acres certain, of a tract of land lying in *Harford* county, known by the name of *Gratuity*, and to give possession by the 1st of December next, and also to patent the said land, and to clear it of every incumbrance whatsoever; which said 250 acres of land is to be laid out most convenient to the home place, so as to include the buildings, as the said *Nicholas D. M. Comas*, his heirs or assigns,

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shall direct; which conveyance is to be made by the said *William M<sup>c</sup>Comas*, his heirs, &c. unto the said *Nicholas D. M<sup>c</sup>Comas*, his heirs or assigns, when the said *Nicholas D. M<sup>c</sup>Comas*, his heirs or assigns, shall pay unto *Zachæus Onion*, his heirs or assigns, the balance of the purchase money at seven dollars an acre, then," &c. The defendants further read in evidence certain certificates of survey returned to the land office, together with their several assignments and endorsements, viz. one a certificate of land surveyed for *William M<sup>c</sup>Comas* on the 7th of May 1789, being a tract or parcel of the reserve land in *Harford* county, beginning, &c. containing 448 acres of land, to be held by the name of *Gratuity*, and which was thus endorsed, "Returned 20th June 1792. December 23d, 1796, the plat and certificate disagree in the direction of the 16th line disallowed. 28th December, 1796, corrected. December 30, 1796, examined and passed. January 26, 1797, assigned by *William M<sup>c</sup>Comas* to *Nicholas D. M<sup>c</sup>Comas*. February 6, 1797, assigned by *Nicholas D. M<sup>c</sup>Comas* to *Thomas Bond Onion*." The other a certificate of resurvey made the 15th of April 1797, for *Thomas Bond Onion*, as assignee aforesaid, of "part of two tracts of lease-land, part of the reserved land lying in *Harford* county, to wit: *Ward's Purchase*, leased to *John Ward* September 1, 1742, for 201 acres, and find it contains a surplus of three quarters of an acre, and have excluded  $12\frac{3}{4}$  acres lying within a survey of *James and Alexander's Paradise*. And of *Lee's Adventure*, leased to *William Few* the 16th of March 1744, for 244 acres, and find it deficient in measure  $15\frac{1}{2}$  acres, and have excluded therefrom one and a quarter acre lying within the lines of *Samuel Harper's* survey; also added  $\frac{1}{4}$  of an acre. The whole reduced into one tract, beginning, &c. containing 417 acres, and called *Belguard*. November 16, 1797, examined and passed. Returned 19th November 1797. The books of the late intendant shew that *William M<sup>c</sup>Comas* purchased in the reserves of *Harford* county the following leases: Part *Ward's* Lease, 191 acres; *Few's* do. 244 acres, making in all 435 acres, £72 10 7. There was a deficiency of 18 acres, £3 0 1, reducing the quantity to 417 acres, £69 10 6. The purchase money was paid to the treasurer on the 20th of November 1797. The certificate was ca

vested by *William M Comas* on the 6th of April 1798. Careat discontinued by act November 1797. Patented 1st January 1800. *Memorandum.* The within certificate is a correction of a survey containing 448 acres, surveyed by the name of *Gratuity* for *William M Comas*, who assigned the same, as within mentioned, to *Nicholas Day M Comas*, who assigned it to *Thomas Bond Onion*." The defendants then read in evidence two grants from the state to *Thomas B. Onion*, one dated the 14th of June 1798, for a tract called *Security*, containing  $32\frac{1}{2}$  acres, surveyed for said *Onion* on the 15th of April 1797, in virtue of a special warrant granted to him on the 6th of February 1797. The other dated the 1st of January 1800, to said *Onion*, as assignee of *N. D. M Comas*, who was assignee of *W. M Comas*, of the tract before mentioned, called *Belguard*, containing 417 acres. The defendants then read in evidence a deed from *Thomas B. Onion* to *Nicholas D. M Comas*, dated the 29th of August 1800, consideration £1500, for the two tracts called *Belguard* and *Security*, agreeably to the two grants before mentioned. And the defendants then prayed the court to direct the jury, that as the fee was vested in *Thomas B Onion* by the two patents for *Belguard* and *Security*, in virtue of the aforesaid assignments, the leasehold estate became thereby merged and vested in *Thomas B Onion*, the patentee. But the court refused to give this direction, but on the contrary directed the jury, that the leasehold interest still subsisted and remained unextinguished, and was not merged in the freehold. The defendants excepted.

5. The plaintiff then read in evidence the letters of administration granted on the 20th of February 1746, to *William Dallam*, on the estate of *John Ward*. Also a deed from the said *William Dallam*, as administrator of *John Ward*, to *Daniel M Comas*, for part of *Ward's Purchase*, containing 191 acres, dated the 17th of April 1747, reciting the Proprietary lease of the 1st of September 1742, for 201 acres, and the license of the Proprietary agent to assign the said lease, &c. He also read in evidence the last will and testament of the said *Daniel M Comas*, dated the 15th of June 1765, whereby he devised the land whereon his son *Daniel M Comas* then dwelt, called *Ward's Purchase*, being in his Lordship's re-

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serve, to be equally divided between his two sons *Daniel* and *John M<sup>c</sup>Comas*, unto them the said *Daniel* and *John*, their heirs and assigns, for ever. The plaintiff then offered in evidence, that after the death of *Daniel M<sup>c</sup>Comas*, the two devisees, *Daniel* and *John M<sup>c</sup>Comas*, entered on the land, and became possessed thereof as the law required. He also offered to read in evidence two deeds from the two devisees, *Daniel* and *John M<sup>c</sup>Comas*, to *William M<sup>c</sup>Comas*, for all their right, &c: to *Ward's Purchase*. That from *Daniel*, was dated the 10th of April 1769, acknowledged on the same day, and recorded the 18th of March 1776; and that from *John* was dated the 21st of December 1774, acknowledged on the same day, and recorded the 18th of March 1776. To the reading of these deeds the defendants objected as being no evidence in the cause, they not having been recorded within the time prescribed by law; and prayed the opinion of the court, that the same were not evidence. Of which opinion the Court were, and they refused to let the deeds be read.

The plaintiff then offered in evidence, that from the date of the respective deeds the said *William M<sup>c</sup>Comas*, for whose use this suit is brought, obtained the possession of the land, and held the possession until in or about the year 1794, when he made a contract with *Nicholas D. M<sup>c</sup>Comas* respecting the same (a.) The defendant then offered in evidence, that the said *William M<sup>c</sup>Comas* purchased from this state the *reversionary interest* the state held in said land, and that under that purchase a survey was made, and a certificate returned to the land office, calling the land *Gratuity*, which certificate was assigned by said *William M<sup>c</sup>Comas* to *Nicholas D. M<sup>c</sup>Comas*, one of the defendants, and to a certain *Thomas Bond Onion*, as herein before mentioned. The defendants also offered in evidence, that *Nicholas D. M<sup>c</sup>Comas* assigned over his interest in said certificate, of *Gratuity*, to *Thomas B. Onion*, who returned another certificate thereon called *Belguard*, on which a patent issued to the said *Onion*, dated the 1st of January 1800. He also offered in evidence a deed from said *Onion* to *Nicholas D. M<sup>c</sup>Comas*, one of the defendants, dated the 29th of August 1800, for two tracts of land called *Belguard* and *Security*. The plaintiff then

(a.) Although it is no where stated, yet the fact is, that *William M<sup>c</sup>Comas* became an insolvent debtor, and transferred all his estate &c. to the lessor of the plaintiff.

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prayed the opinion of the court to the jury, that from the facts and circumstances aforesaid, they may and ought to presume that legal conveyances had been made from *John* and *Daniel M. Comas*, the legatees aforesaid, to *William M. Comas*, for whose use this suit is brought. But the court were of opinion, that the doctrine of presumption is to be resorted to, to fortify long and ancient possessions, when from the great lapse of time a probability may arise that title papers have been lost. But since the first of May 1767, all conveyances of land are to be placed upon the public records; or no interest for more than seven years will pass; and the court will not direct the jury to presume legal conveyances to have been made, when deeds regularly executed since the 1st of May 1767, are produced, which appear to have been recorded several years after the time prescribed by law. Their being placed on record by the party, (though not in due time,) operates against the presumption, as it is an evidence that he relied on them to support his title; and to presume a legal conveyance to support a possession of only thirty-eight years standing, under the circumstances existing in this case, would be to elude the act of 1766, and to carry the doctrine of presumption farther than it is believed ever to have been carried in this state, to support a possession that commenced subsequent to the passage of that act. The court therefore refused to give the direction prayed. The plaintiff excepted. Verdict and judgment for the plaintiff for *Lee's Adventure*. From that judgment both the plaintiff and defendants appealed to this court.

The cause was argued on both appeals before CHASE, Ch. J. and BUCHANAN, and EARLE, J.

*Key* and *T. Buchanan*, for *Bradford's Lessee*, upon the third bill of exceptions, referred to *Norwood vs. Carroll, et al. Lessee*, 4 Harr. & M<sup>c</sup>Hen. 287: *Hall vs. Gittings's Lessee*, 1 Harr. & Johns. 18; and *Yard vs. Ford*, 3 Saund. Rep. 175, (note.)

No counsel appeared for the other side.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that the court below erred in refusing to give the direction prayed in the third bill of exceptions. It appears by the facts stated, that the plaintiff de-

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rived his title to *Ward's Purchase* under a lease from the agent of the Proprietary, granted to *John Ward* on the 1st of September 1742, and deduced a regular title under that lease to *Daniel* and *John M. Comas*, the sons and devisees of *Daniel M. Comas*, under his will made the 15th of June 1765. It also appears that *Daniel M. Comas*, the son, was living on the land at the time of making the will. It also appears that the plaintiff claimed title to the land, and offered in evidence two deeds, one from *Daniel M. Comas* dated the 10th of April 1769, the other from *John M. Comas* dated the 21st of December 1774, the said devisees, to *William M. Comas*, under whom the plaintiff claims, for the said land, which deeds were rejected by the court as not being legal evidence—not having been recorded within the times required by law. It also appears, that *William M. Comas* became possessed of the said land from the dates of those deeds, and continued in possession until the year 1794, when he made the contract with *N. D. M. Comas*, one of the defendants. It also appears that no title was set up by the defendants adverse to the title under the said lease, and that *William M. Comas*, and those under whom he claims, have always possessed the land, under the said lease, to the year 1794, and that the possession of *N. D. M. Comas* was acquired under the contract with *William M. Comas*, under whom the plaintiff claims, and not in opposition to his title.

These facts, in the opinion of the court, laid a sufficient foundation for the jury to presume good and valid deeds from *Daniel* and *John M. Comas* to *William M. Comas*, of the said land, and the jury could not be precluded from making such presumption by defective deeds offered in evidence, because the same not being legally admissible, were properly rejected, and could have no influence on the minds of the jury.

The court dissent from the opinion stated in the *third* bill of exceptions, and concur with the opinions in the *first* and *second* bills of exceptions.

On the appeal by the plaintiff,

JUDGMENT REVERSED, AND PROCEEDENDS AWARDED.

On the appeal by the defendants,

JUDGMENT AFFIRMED.

RINGGOLD vs. GALLOWAY, *et ux.* Lessee.

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DECEMBER.

APPEAL from *Washington County Court*. Ejectment for *Chew's Farm*. The defendant, (now appellant,) took defence on warrant, and plots were made.

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1. At the trial the plaintiff read in evidence a certificate of the survey of *Chew's Farm*, dated the 10th of April 1734, and the patent thereon issued to *Samuel Chew* the 23d of June 1736, for said land, described as "all that tract or parcel of land called *Chew's Farm*, lying in the aforesaid county, (*Prince-George's*), on that part of *Potomack* river commonly called *Connegocheig* land, and beginning at the end of the fourteenth line of his Lordship's manor, called *Connegocheig Manor*, and running thence," &c. "containing 5000 acres of land more or less, to be held of *Connegocheig Manor*." And also the certificate of resurvey of *Conococheague Manor*, dated 25th of October 1736, viz. "Maryland, sct. In obedience to an order from his Excellency *Samuel Ogle*, Esquire, Governor of *Maryland*, to resurvey for his Lordship, the Right Honourable the Lord Proprietary of *Maryland*, his said Lordship's manor of land lying in *Prince-George's* county, called *Connegocheig Manor*. These are therefore humbly to certify, that I have carefully resurveyed the above said tract or manor of land, according to its first intended bounds, and beginning at a bounded," &c. "containing 10,594 acres of land." And proved by competent witnesses that *Samuel Chew*, the patentee of *Chew's Farm*, died seized of said land, leaving *Samuel Chew*, his eldest son and heir at law, who on the death of his father entered and was seized thereof. That *Samuel Chew*, the son, had issue three daughters, *Henrietta Mariam*, married to *Benjamin Gal-*

Where the certificate of survey of a tract of land called *C F*, made in 1736, stated that tract to begin at the end of the 14th line of *C Manor*, and it was proved that the original certificate of survey of *C Manor* was not recorded in the records of the land office, nor to be found among the papers of that office, parol evidence was admitted to prove that a survey of *C Manor* was originally made prior to, or contemporaneous with, the survey of *C F*, and it was held, that where the 14th line of the survey of *C Manor* terminates, according to its true location, is the place where *C F* begins; and whatever is competent and legal evidence to prove the beginning of *C F*, is legal and competent to prove the termination of the 14th line of *C Manor*, and so vice versa.

In the absence of proof as to the beginning, trees and courses of *C Manor*, (the beginning tree being destroyed or incapable of proof, and the courses lost,) the legal foundation being laid, the next best or secondary evidence

may be resorted to, that is, parol evidence of the beginning of *C F*, calling to begin at the 14th line of *C Manor*, and by reversing the lines from that point to the place of beginning of *C Manor*.

Where a survey has a tree at the beginning, and all the lines are course and distance, and the tree cannot be proved, the survey may be preserved by the reference of a junior survey to the end of some of the lines, if the piece of reference can be proved.

The return to a commission for establishing the boundaries of land, issued in 1784, being defective, as appears by the record thereof, and not appearing that legal notice had been given, the plaintiff in ejectment offered in evidence, that the original commission and testimony, reduced to writing by the commissioners, and their return, were duly returned and recorded, and in the margin of the record thereof marked "Exam'd & Deliv'd. R D;" that *R D* attended to the execution of the commission for the persons who obtained it, they residing, and having continued to reside more than 100 miles off, and that they and *R D*, were all dead; that the original commission, &c. were not to be found, although diligent search had been made amongst the papers of *R D*. He then offered to prove by two of the commissioners, that the persons examined by them as witnesses were dead; and then offered to prove what such persons declared, when examined in their presence and hearing, and that such declarations were reduced to writing, and returned by said commissioners as the depositions of said witnesses—held by the county court, that the loss of the commission, &c. was not sufficiently proved to let in parol evidence of the contents of the depositions taken and returned by the commissioners.

A paper purporting to be the field notes or courses of the survey of a parcel of land called *C C* proved to be in the handwriting of *J T*, who was accustomed to survey lands in the early part of the last century, and who originally surveyed *C Manor*, was offered as evidence of its ancient running—held by the county court, that such paper could not be used in evidence for said purpose.

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loway in the year 1775, and *Ann*, since dead, and *Elizabeth Crowley*, married to *Peregrine Fitzhugh*; and that *Samuel Chew*, the son, so being seized of *Chew's Farm*, conveyed to his daughter *Henrietta Maria Galloway*, by deed dated the 10th of December 1782, an undivided third part of an undivided moiety of the said land. This daughter, and *Benjamin Galloway* her husband, are the lessors of the plaintiff. He further read in evidence the will of *Samuel Chew* last mentioned, dated the 24th of November 1785, containing, amongst others, the following devises: "I give and bequeath to my daughter *Ann Chew*, all my lands in *Washington* county, being one third part of a moiety of a tract of land called *Chew's Farm*, containing by patent 5000 acres, (the said third being known as number two in the plot or division which lately took place by agreement, the other two thirds having been before given by me by deed to my daughters *Henrietta* and *Elizabeth*, which deeds I hereby ratify and confirm,) together with all my interest, which is one third part of the moiety of those parcels of land which may have been added by resurvey or otherwise, to said tract of land called *Chew's Farm*, to her my said daughter *Ann Chew*, and her heirs, for ever, in fee simple. But if my said daughter *Ann Chew* shall die before she arrives at the age of sixteen years, or shall not marry, then in either of those cases I bequeath and give the real estate devised in this will to my said daughter *Ann*, to be equally divided betwixt my two daughters *Henrietta* and *Elizabeth*, to them and their heirs, for ever, in fee simple; or if my said daughter *Ann* shall die without issue, and not dispose of the said estate by deed, will, or otherwise, in such case I give and bequeath it as before to my two daughters, and their heirs, in fee simple, to be equally divided betwixt them." The plaintiff then gave in evidence the plots and locations in the cause; and that all his locations thereon were true. He then read in evidence the deposition of *John Kilty*, Esquire, Register of the Land Office for the *Western Shore*, taken by consent, and admitted to be read in evidence, to prove that the original certificate of survey of *Conococheague Manor*, referred to in the certificate and patent of *Chew's Farm*, and in the resurvey on the said manor in October 1736, was not recorded in the records of the land

office, nor to be found among the papers or in the records of that office; and he then offered to prove, by competent witnesses, that an original survey of *Conococheague Manor* was made prior to, or contemporaneous with, the survey of *Chew's Farm*, and that the end of the 14th line of said original survey of the manor and beginning of *Chew's Farm*, was actually made in the country, when taken up, at the point or place on the plots described by letter black A, according to the plaintiff's location thereof. The defendant objected to the admission of any parol evidence for that purpose. But the Court, [Buchanan, Ch. J. and Shriver, A. J.] were of opinion that the plaintiff might offer parol evidence to prove that a survey of *Conococheague Manor* was originally made prior to, or contemporaneously with, the survey and certificate of *Chew's Farm*. The defendant excepted.

2. The plaintiff then offered to read in evidence the record of a commission issued from *Washington county court*, on the 1st of January 1784, at the instance of *Samuel and Bennet Chew*, for establishing the boundaries of *Chew's Farm*, and the execution thereof in April 1784, and the testimony of the witnesses therein contained, and reduced to writing by the commissioners, but not signed by the witnesses. This evidence being objected to by the defendant, the court did not permit it to be read, it not appearing that legal notice had been given. The plaintiff then offered in evidence, that the original commission and testimony, reduced to writing by the commissioners, and their return, were returned with the commission to the clerk's office of *Washington county*, and were duly recorded. And offered also to prove, by the present clerk of the said court, that the said original commission, return thereof, and testimony reduced to writing, are not now to be found in his office. And also offered in evidence the following entry in the margin of the records of his office, where the said commission and proceedings were recorded, to wit: "Examined and delivered, *Richard Davis*;" and that such marginal entry was the usual and general practice to denote to whom the originals were delivered. And further proved, that *Samuel Chew* and *Bennet Chew*, the persons at whose instance the said commission issued, lived, at the

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time of issuing and executing the same, on the *Eastern* shore of this state, more than 100 miles from *Washington* county, and were not present at the execution thereof; and that *Samuel* and *Bennet Chew* both died on the *Eastern* shore, the first in 1786, and the last in 1793; that they were both old men, and that neither of them ever was in *Washington* county from the day of issuing said commission, until their respective deaths. And further swore and offered a witness to prove, that *Richard Davis*, to whom the original commission and return, and execution thereof, is entered on the record aforesaid to have been delivered, attended to the execution of said commission for said *S. & B. Chew*, and that he died in the year 1788. And also proved by *Samuel Hughes, jun.* a witness sworn for that purpose, and counsel in the case, that he applied to Col. *Rezin Davis*, in his life-time, who was the executor of the said *Richard Davis*, deceased, to search among the papers of his deceased father for said commission and return, who informed the said *Hughes* that he had carefully searched among his father's papers for the same, but it was not to be found; and that the said *Rezin Davis* was summoned for the plaintiff in this cause, to give evidence of that fact, but that he is since dead; and that since the death of the said *Rezin Davis*, the said *Hughes* applied to Mrs. *Eleanor Davis*, his executrix, for permission to search among his papers for said commission and return, who produced to him those bundles and bags of papers which she understood contained the papers of *Richard Davis*, deceased, where the said commission and return might be supposed to be, but after much diligent search the same was not to be found. The plaintiff further offered in evidence to the court, that more than twenty-six years have elapsed since the said original papers were recorded, and twenty years since the death of *Davis*, to whom they were delivered; and offered to prove to the court, by one of the commissioners who was sworn at A, that if the original commission and depositions were here, the matter contained in them would tend to establish the plaintiff's locations at A, and his pretensions. And having thus shown that he was interested to produce said paper, and having as above accounted for the nonproduction of it, the plaintiff produced and swore *Elie Williams* and *Paul Hoge*, the two commissioners

named in said commission, and offered by them to prove to the jury, that the persons examined by them as witnesses were dead. And further offered to prove by them, as the declarations of persons now dead, what they declared at that time in their presence and hearing, and which was by them reduced to writing, and returned by them as their depositions in the commission, as to the end of the fourteenth line of the original survey of *Conococheague Manor*, ending at the point A on the plots, and *Chew's Farm*, beginning at the same place. To this evidence the defendant objected. And the court were of opinion, and so decided, that the loss of the said commission, depositions and return, were not sufficiently proved to let in parol evidence of the contents of the depositions taken and returned by the commissioners, and refused to let such evidence go to the jury. The plaintiff excepted.

3. The plaintiff then, by a competent witness, gave evidence, that a certain *John Flint*, an old man, and many years since dead, was accustomed to survey and run lands in the early part of the last century. That an old man named *Van Swearingen*, was born before the year 1690, and lived on land then vacant, but since forming part of and included in *Conococheague Manor*, at the time said manor was originally surveyed; that said *Van Swearingen* died about fifteen years ago, at the age of 109 years, and from before and at the time of the original survey of said manor, until his death, he had resided on said land and manor. And gave in evidence the declarations of said *Van Swearingen*, often made, that an old man of the name of *John Flint* made the original survey of *Conococheague Manor*; that the said *Flint*, while he was employed in making the survey of said manor, frequented and staid at the house of the said *Van Swearingen*, and made it his home. And further gave in evidence, by a competent witness, the Declaration of *Joseph Chapline*, deceased, who died about forty years ago, and was sixty years old when he died, that he *Chapline* said he was employed by *John Flint* as a chain-carrier, and that he acted as chain-carrier on the original survey of *Conococheague Manor*, and that the same was made by *John Flint* as surveyor, and that the money he got as chain-carrier on that survey enabled him to take up the first hundred acres of land he took up. And further read

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in evidence the deposition of *Archibald Orme*, aged 79 years and upwards, taken by consent, who proved that he knew *John Flint* in 1752 and 1753, and was taught surveying by him, and that the said *Flint* was at that time an old infirm man; that he was an old surveyor, and had been many years employed in running and surveying lands; and that it was generally known and understood that said *Flint* had been much accustomed to run and survey lands in that part of *Prince George's* county, now called *Frederick* and *Washington* counties; that the said *Flint* was much employed by wealthy people in old times, and originally run and took up *Carroll's* manor on *Monocacy*, and *Dulany's* lands in *Frederick*, as the deponent generally understood; that it was the general usage and practice, from 40 to 50 years ago, for persons having warrants, to get persons who could survey, to run their lands, and the deputy surveyors of the counties would from the courses so run, make out certificates, and send them to the land office, and have them examined, for patents to issue; and the plaintiff read said deposition, further to prove the hand-writing of said *John Flint*, and thereby proved that the paper annexed is the proper hand-writing of the said *John Flint*, which paper is as follows, viz: "*Conegosheigoe Creek*. Beginning at a bounded blake wall-nut standing near the mouth of the sd. creek, and the bank of the River *Potawmake*, viz. on ye S E side of ye sd. creek, then for the given line East 200 pr. and continue for 2 or 3 mile, thence from ye sd. bounded tree, down said river S 25 d. E 110 pr." &c. "then up the sd. East side of the side mash, North 27 d. E for 4 mile, or more, according as want to include the improvements; then for the complement to the end of ye East line." This paper was located by the plaintiff on the plots. The plaintiff further offered evidence, that the lessors of the plaintiff had for many years held and claimed *Chew's Farm* up to the line from A, with the parts marked on the plots, Nos. 1 and 2. And he then produced and offered to read said paper to the jury, as the field notes or memoranda in the hand-writing of said *John Flint*, who originally run *Conococheague Manor* as above stated, as evidence of its ancient running, and that the fourteenth line of said original manor ended at or about the letter A on the plots, where he the plaintiff had located the same.

The defendant objected to the said paper being offered in evidence for the purpose aforesaid. And the court sustained the objection. The plaintiff excepted.

4. The plaintiff then swore witnesses to prove, that a certain *Van Swearingen*, about twenty years ago, died in *Washington* county at the age of 109 years, and that the said *Van Swearingen* had lived for sixty years preceding his death on the land now contained within the lines of *Conococheague Manor*, but vacant land when he first lived there; and proved by *Charles Swearingen*, son of said *Van Swearingen*, of the age of seventy-seven years, that he was born there, and has lived all his life at the same place, and he has often heard his father say, that one *John Flint*, an old man, accustomed to run and survey lands, first run and surveyed *Conococheague Manor* and *Chew's Farm*; and that while said *Flint* was engaged in running said manor, he frequented the house of said *Van Swearingen*, and made it his home; and that his deceased father said he was often with *Flint* whilst he was resurveying said manor. And further, that his father, more than fifty years ago, when riding by the place A on the plot, slapping his son, the witness, on the back, and putting his hand on the locust tree at the point A, told him said tree was the beginning of *Chew's Farm*; that he the father was told so by the aforesaid *Flint*, at the time of the aforesaid running, and he has often heard his said father say so, but the witness never heard his father say that he heard this from any other person than the said *Flint*, and never from said *Flint* except at the time aforesaid; that he has often heard his father say, and has always understood, that one line divided *Chew's Farm* from the manor. And further, about 40 years ago his father cut down the tree at the point C on the plot, and often told his son that the said tree was on the line of division between *Chew's Farm* and the manor, and the witness has heard the same from other elderly persons, but who he does not recollect; and he always understood, and has heard, that the stone now planted at C, where the tree was cut down, was planted by Mr. *Ringgold's* father. That the tree, denoted by red A on the plot, was marked by some persons who appeared to be surveying, about fifty years ago, who run near where the witness was working, but who they were, or what land they

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were running, the witness does not know, nor under what authority they acted; they said it was a line tree of my Lord's manor. The plaintiff further offered evidence, that the possessions marked on the plot No. 1 and No. 2, were those of the lessors of the plaintiff, claiming *Chew's Farm* more than 25 years ago, and that about twelve years ago they were, by the order of the lessors, excluded as not lying in their lines, and one year afterwards were inclosed by the proprietors of *Conococheague Manor* as part of the same, and had ever since been held by them as such. And that a certain *Joseph Chapline* died about forty years ago, being then of the age of sixty years, and that said *Chapline* in his life-time declared that he was a chain-carrier to old *Flint*, when the said *Flint* was running the original manor of *Conococheague*, and that as chain-carrier he was paid for the same. And produced and read in evidence the deposition of *Orme*, so far as the same contained legal and competent testimony, to prove the usage and custom in taking and making up old surveys, and the character and habits of the said *Flint*. The defendant then offered in evidence the plots and explanations, and gave evidence that the locations on his part were true. He then read in evidence the original certificate of *Butcher's Fancy*, made for *James Butcher*, the 25th of August 1763, "by virtue of an order from his excellency *Horatio Sharpe*, esq. Governor of *Maryland*, and the honourable *Edward Lloyd*, his Lordship's agent of the Province, to lay out for the several persons that shall from time to time apply for any quantity or quantities of land within his Lordship's manor, lying in *Frederick* county, called *Conococheague Manor*," &c. containing 100 acres. And also a lease from the agent of the Proprietary to *James Butcher*, for the above land, dated 25th of August 1763, for 20 years. He further offered in evidence, that shortly after the said lease was made, the said *James Butcher*, under and by virtue of said lease, entered on and possessed the land therein mentioned, as the same is located on the plots, and that the said land had been ever since held and possessed as a part of *Conococheague Manor*, and had been actually and constantly enclosed by fence, for more than 30 years, as a part of *Conococheague Manor*. That the part marked No. 7, with red letters and figures, near A, had been held by actual and constant enclosure, by fence and culture, for more

than 40 years, as a part of *Conococheague Manor*. The defendant then read in evidence the original certificate of survey of *Level Plain*, made the 26th of August 1763, in pursuance of an order of the governor and agent, out of the said manor, containing 200 acres. Also a lease to *George Ross* for the same land, for 21 years, and the patent for the said land to *Thomas Ringgold*, who had purchased the same from the Proprietary agents, dated the 26th of May 1774. He further offered in evidence, the original lease of *Addition to Level Plains*, dated the 29th of September 1765, to *George Ross*, and the patent for the same, dated the 26th of May 1774, to *Thomas Ringgold*, for 170 acres, also a part of the said manor. That the enclosure marked No. 6 on the plots, and included by the red and scratched lines described by red letters, &c. had been held, enclosed and cultivated, as a part of *Conococheague Manor*, for more than 40 years. The plaintiff then prayed the court to direct the jury, that the certificate of the resurvey on *Conococheague Manor*, in October 1736, and the certificate of *Chew's Farm* in 1734, and the patent thereof in 1736, heretofore mentioned, were evidence that a legal survey of *Conococheague Manor* was made prior to, or cotemporaneous with, the original survey of *Chew's Farm*, and that the deposition of *John Killy* was evidence that such certificate of the said manor was not on record, nor the original papers to be found, and that the plaintiff cannot procure a copy thereof from the said records, and that if the jury believed, from the evidence aforesaid, that *Chew's Farm* did begin at A, as the plaintiff had located it, that then it was evidence that the fourteenth line of the original manor called for, ended at the same place. Upon this prayer the court gave the following opinion: The certificate of resurvey on *Conococheague Manor* in October 1736, and the certificate of *Chew's Farm* in 1734, and the patent thereof in 1736, are evidence to the jury that a survey of *Conococheague Manor* was made prior to, or cotemporaneously with, the original survey of *Chew's Farm* in 1734, and the deposition of *John Killy* is evidence that no certificate of *Conococheague Manor*, prior to that of October 1736, is on record in the land office; that the original papers are not to be found in that office; and that the plaintiff cannot procure a copy thereof from the said records. And if proof that *Chew's*

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*Farm* did originally begin at A, as the plaintiff has located it, it is not evidence that the 14th line of *Conococheague Manor*, as originally surveyed, ended at the same place, yet on the loss of the certificate and courses of that survey of the manor, if the original termination of the 14th line cannot be proved or found, proof of the original survey and location of *Chew's Farm*, from the place marked A on the plots, is evidence from which the jury may find that point to be the beginning of *Chew's Farm*.

If any line of a tract of land is described in the grant to run a certain course and distance to a fixed boundary, if that boundary can be found, the line must be run to it, although in doing so, the course and distance may be varied. But if the boundary called for cannot be found, or the place where it stood ascertained, the course and distance expressed in the patent, (with such allowance for the variation of the compass as a jury, under the circumstances of the case, may make,) must regulate the location of the line. So if a line of one tract of land calls to run a certain course and distance to the beginning, or any other part of another tract, that beginning, &c. must be run to, if it can be found, regardless of the course and distance; but if there is no such land as the tract called for, or the beginning, &c. is lost, so that the call cannot be gratified, the description by course and distance must be obeyed. But in every such case the course and distance must yield to the call if it can be gratified, and can only be resorted to as the next best evidence of the true location of the land, when the place or thing called for cannot be found; and so in this case, which indeed is not that of a line expressed to run a certain course and distance to a fixed boundary, in which the course and distance must govern, if the boundary is lost, but it is the case of one tract of land calling to begin at the end of a certain line of another tract, the termination of which line, if it can be found, must regulate the beginning of the defendant's land, and no proof of any other beginning can be admitted to contradict the record; but if it cannot be found, other evidence may be resorted to, and the beginning, being a point without course or distance to direct or control it, on the loss of the place called for, parol proof of the place from which it was run when originally surveyed, may be received, being the best evidence of the beginning which the

nature of the case will admit of, and not in contradiction of the record.

As to the weight of evidence in this case we are not to be understood as giving any opinion. But where the 14th line of the manor, as originally surveyed ended, and where *Chew's Farm*, as surveyed in 1734 began, are questions to be decided by the jury upon the whole of the evidence before them. The defendant excepted.

5. The defendant then prayed the opinion of the court to the jury, that the jury cannot find that *Chew's Farm* began at the letter A, unless they find that there was a survey of the manor made antecedently to, or contemporaneously with, *Chew's Farm*, the fourteenth line of which ended at the letter A, and that the evidence aforesaid, offered by the plaintiff, was not sufficient to authorise the jury to find that there was any such survey of the *Conococheague Manor* so made, the fourteenth line of which ended at A, or that the said tract called *Chew's Farm* did begin there. This opinion the court refused to give, and referred to their opinion contained in the next preceding bill of exceptions. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued on the *first, fourth, and fifth* bills of exceptions, before CHASE, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J. by

*Martin*, for the Appellant; and by  
*Key and Shaaff*, for the Appellee.

CHASE, Ch. J. delivered the court's opinion. It is conceded in this case that the original survey of *Conococheague Manor* was prior to, or contemporaneous with, *Chew's Farm*, and the decision of the court below in that respect is satisfactory and acquiesced in.

It is certain, beyond a doubt, that the place where the 14th line of the survey of *Conococheague Manor* terminates, according to its true location, is the identical place where *Chew's Farm* begins, and whatever is competent and legal evidence to prove the beginning of *Chew's Farm*, is legal and competent evidence to prove the termination of the 14th line of the manor, and so *vice versa*. If the beginning tree and the courses of the manor could be proved, the

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location of the manor from that tree to the end of the 14th line, is the true location, and would be conclusive evidence of the beginning of *Chew's Farm*, at the termination of the said 14th line. In the absence of such proof, the tree, the beginning of the manor, being destroyed or incapable of proof, and the courses lost, the legal foundation being laid, (which has been done by the deposition of *John Killy*, the late register of the land office,) the next best or secondary evidence may be resorted to, and is legally admissible; that is, proof by parol evidence of the beginning of *Chew's Farm*, or the terminating of the 14th line of the manor, and by reversing the lines from that spot or point to the place of beginning of the manor, the only mode by which it can be ascertained. The admission of this evidence does not preclude the best evidence, the proof of the beginning tree, but is substituted in its place for want of that superior evidence, and no evil or inconvenience results from the admission of such testimony, but the most beneficial effects, for thereby the survey might be preserved and perpetuated. It not unfrequently happens, that where a survey has a tree at the beginning, and all the lines are course and distance, and the tree cannot be proved, that the survey has been preserved by the reference of a junior survey to the end of some of the lines, which place of reference can be proved.

The court concur in the opinions given by the court below in the *first, fourth, and fifth* bills of exceptions.

JUDGMENT AFFIRMED.

DECEMBER.

MUNDELL'S LESSEE VS. CLERKLEE.

APPEAL from *Prince George's County Court*. Ejectment for a tract of land called *Mundell's Survey*. The defendant, (now appellee,) took defence on warrant, and plots were made.

1. At the trial the plaintiff read in evidence the patent of *Mundell's Survey*, granted to the lessor of

To lay a foundation for presuming a grant for land, it is necessary to show an incipient title from the Proprietary; that is, an equitable interest direct from the Proprietary by a located warrant and payment of the composition; and length of possession consequent on such equitable interest, in the person acquiring the same, and those claiming under him.

Where the defendant in ejectment offered in evidence certain common warrants granted to N B in 1694, for the surveying several parcels of land; and to prove that the land called *B R*, for which he took defence, was surveyed under the said warrants, and that a patent had been granted therefore to N B, and that the jury ought to presume such patent to have issued, he offered in evidence a deed from N B to J R, dated in 1696, for a parcel of land called *B R*; also certain entries on the rent rolls, showing that *B R* had been surveyed for N B in 1695, and an alienation thereof in 1706 by N B to J R, and that it was afterwards possessed by R L.—Also a deed from J R to R L in 1737, for *B R*, and that R L had paid the quit rents from 1753 to 1772, and the county assessments from 1781 to 1804, and that R L, and his heirs, had been in possession during that time.—*Held*, that these facts were not sufficient for the jury to presume a patent issued to N B for the land called *B R*.

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the plaintiff on the 21st of October 1803, and a patent for *Beall's Reserve*, dated in 1695, granted to *Mordecai Moore*, reciting, that the said *Moore* had set forth that he had assigned unto him by *Ninian Beall*, of *Calvert* county, a certain tract of land for 455 acres in *Calvert* county, surveyed for the said *Beall* the 25th of July 1684, and that the surveyor, in returning the said certificate of said land, had through mistake certified, that said land was laid out for said *Beall* by virtue of a warrant for 1000 acres, granted to him the 15th of February 1683, whereas in reality the warrant then granted to him, and by virtue whereof the said land was laid out, was for 1500 acres, by means of which mistake of the surveyor, the said *Beall's* grant of said land had been delayed to be passed. That the said *Moore* had made it evidently appear, that the said 455 acres were surveyed for said *Beall* by virtue of a warrant for 1500 acres granted him on the said 15th of February, there being so much of the said warrant no otherwise made use of, and no warrant for 1000 acres of that date being granted to the said *Beall*. Wherefore, it appearing palpably that it was merely the mistake of the surveyor in inserting in his certificate the words 1000 only, in lieu of 1500, and that the said *Moore* prayed that the mistake might be rectified, and a grant to him made pursuant to the said *Beall's* assignment, &c. Therefore there was granted to the said *Moore* all that tract or parcel of land called *Beall's Reserve*, lying in *Calvert* county, on the west side of *Patuxent* river, and in the freshes of the said river, and on the west side of a branch called *Collington*, and on the west side of *Edward Isaac's* land, beginning, &c. containing 455 acres. He further gave in evidence, that his locations on the plots in the cause were correct. The defendant then read in evidence the following extracts from the land office, of three several warrants having issued to *Ninian Beall*, to wit: "May 23, 1694. Warrant for 3000 acres, dated the 18th of July 1689, granted to *Ninian Beall* of *Calvert* county, this day renewed for the said quantity. December 20, 1694. Warrant then granted to *Ninian Beall* for 1673 acres of land, due to him by renewment of that quantity out of a warrant for 3000 acres, granted him by renewment the 23d of May 1694. September 21, 1695. Warrant then granted *Ninian Beall* of *Calvert* county, for 400 acres of land, being due

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to him by renewal of part of a warrant for 1673 acres of land, granted him by renewment the 20th of December 1694." And to prove that *Beall's Reserve*, the land for which the defendant took defence, was surveyed in virtue of the said warrants, and that the same had been patented to said *Ninian Beall*, and that the jury might and ought to presume such patent to have issued, he also offered in evidence a deed from said *Ninian Beall* to *James Ranton*, dated the 15th of July 1706, for all that tract or parcel of land called *Beall's Reserve*, lying in *Prince George's* county, on the west side of *Patuxent* river, in the woods, and on the east side of the main branch of *Piscataway*, beginning at a bounded white oak, being the S W bounded tree of a parcel of land surveyed for *Thomas Brooke*, called *The Forest*, thence S S W 320 ps. to a bounded white oak, thence E S E 200 ps. thence N N E 320 ps. thence with a straight line to the first boulder, containing 400 acres more or less. And also read in evidence the following entries from the rent rolls, to wit: "400 acres, 16s rent. *Beall's Reserve* sur. 17 June 1695, for Col. *Nin. Beall* beg. at a bd. oak of the land called—. Poss. Col. *Nin Beall*. 400—16—*James Rantin*, from *Ninian Beall* 15th July 1706. 400—16—*Beall's Reserve*, surveyed 17th of June 1695, for Col. *Ninian Beall*, beg. at a bound oak—Poss. 400—0 16 0. *Richard Lee*, esq." Also a deed from the said *James Ranton* to *Richard Lee*, dated the third of August 1737, for all that tract or parcel of land called *Beall's Reserve* lying in *Prince George's* county aforesaid, and adjoining to a parcel of land belonging to *Thomas Brookes*, called *Potomak Forest*, containing 400 acres of land more or less. Also extracts from *Prince George's* county debt book, showing that part of *Beall's Reserve*, 400 acres, was charged to *Richard Lee*, from the years 1733 to 1772, inclusive. And to prove that *Richard Lee* had, and those claiming under him have been in the possession and the use of said land, proved by competent witnesses, that for a number of years past, and as far back as the recollection of the witnesses extended, that said land had been cultivated and used by said *Lee*, and his tenants, and that no person, to the knowledge of the witnesses, had possessed any part of said land, except said *Richard Lee*, and those claiming under him, claiming the same as *Beall's Reserve*, but that

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a part of *Beall's Reserve*, as located by defendant, and so much thereof as was comprehended within the lines of *The Plains of Shrewsbury Resurveyed*, as located on the plots, had been in the continued possession, use and occupation, of the owners of said last mentioned tract of land, from about the time of the same being taken up. It was further proved, that *Richard Lee*, under whom the defendant claimed, lived at this time about 30 or 40 miles from said land, and that *Russell Lee*, his heir, was a minor, and died under the age of 21 years; and that the witnesses, who were about the age of sixty years, lived on the adjoining land. And to prove that *Richard Lee*, and those claiming under him, had been charged with and paid assessments for said land, the defendant offered in evidence the assessment lists of *Prince-George's* county for several years; by which it appeared that in 1781 and 1782, part of *Beall's Pasture*, 400 acres, was assessed to *Richard Lee*. In 1783 part of *Beall's Plains*, by resurvey 400 acres, was assessed to him. In 1786 part of *Beall's Pleasure*, 400 acres, tenanted to *Saml. Townsend*, was assessed to him. In 1793, 1798 and 1804, *Beall's Reserve*, 400 acres, was assessed to his heirs. And to prove that the land stated in the assessment books, and the land included in the deed from *Ninian Beall*, and referred to in the rent rolls and debt books, were the same, the defendant offered in evidence, that *Beall's Reserve*, as located by him, was situated in the hundred of *Prince-George's* county, distinguished by *Grub Hundred*, from which the said extracts are taken, and that the said *Richard Lee* had no land called *Beall's Pasture*, *Beall's Plains* or *Beall's Pleasure*, unless *Beall's Reserve* had acquired those names by reputation. And also offered in evidence, that *Richard Lee*, and those claiming under him, had paid the taxes on the whole of *Beall's Pasture*, and that the same had not been assessed to any other person, and that the whole tract was generally understood to be the property of said *Lee*, and those claiming under him. And also offered in evidence, the following certificates of adjoining surveys, and which were truly located by the defendant, viz. *Potomack Landing*, surveyed the 5th of April 1685: *The Forest*, surveyed the 5th of September 1694: *Shrewsbury Plains*, surveyed the 2d of October 1719: *The Widow's Trouble*, surveyed the 15th of January 1732-3: *Blacklock's Venture*, surveyed the

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15th of December 1755; and *The Plains of Shrewsbury*, surveyed the 25th of January 1772. It was also proved, that the record Books of the land office had been searched, and no patent for the land called *Beall's Reserve*, for which the defendant took defence, could be found, nor any certificate for the same. And further, that the record book for patents and certificates, retorded in the year 1695, was in the land office. The following testimony was also by consent admitted: The deposition of *John Callahan*, who deposed, that "previous to the year 1700, the register of the land office did not record, as it appears by the old record books in his office, the payment made by the party of the composition money for lands surveyed for such party, or make any marginal note in the record of the certificate of such payment, whether the certificate was made upon a warrant of resurvey, or whether the certificate, when returned, included more land than was expressed upon the warrant or warrants upon which the same was made. That in the year 1679, and before and after, as far down as the year 1700, there are many certificates for lands surveyed for different persons, recorded in the land office, upon which it cannot be found that there is or are any patent or patents recorded in said office. That it is, and always has been, customary to recite in the patent or grant, when issued, the consideration upon which the same issued, and the manner in which the composition money for the land mentioned in such grant was paid. That since the revolution several old patents, granted between the years 1678 and 1701, as far back as the year 1682, which were in the hands of those holding under the patentee therein named, and which had never before been recorded in the land office, have been produced to him to be recorded, and have been recorded; that it has sometimes happened to himself, since he has been in office, that the person for whom a patent was made out, took it to the governor to procure his signature, and having obtained it, never returned the patent to him to be recorded, whereby it happened that a patent in such case did regularly issue, and yet there was and is no record of it in his office. That for near thirty years last past, he has from time to time, frequently heard a report, that one of the old record books in the Proprietary land office, containing the record of patents, has been lost. That the record books in the land office refer from

one to the other, and that he never found a reference to any record book which is not to be found in the office, and that he from thence is of opinion no record book has been lost out of said office, burnt or destroyed. Also the deposition of *John Brewer*, who dep osed, that he was and at present is an assistant clerk to *John Kilty*, register of the land office, and had for eleven years last past been clerk in said office, acting for many years in said office as a clerk to *John Callahan*, the register of said office, and that he never heard or understood that any record book belonging to said office had been lost or missing of late years. He never heard or understood that any record book of said office had been lost during the revolutionary war, or at any period shortly before. That *Mr. Callahan*, now dead, informed him, that he had never seen in the office a reference to a book in the office which he could not find; that seeing a record book of certificates in the office for a number which he could not find patents, he was sometimes induced to believe a record book of patents might have been lost; but on the whole he thought no book was lost. That the warrants are all recorded in different books from the books in which the certificates and grants are recorded, and he never heard, nor from many years examination of the records has he any reason to believe, that any record book of warrants was lost. The defendant also offered in evidence the warrants and the rent rolls aforesaid, together with the other evidence offered by him, to prove that the said *Beall* was in the possession of the land until his conveyance to *James Ranton*; and to prove that *Ranton* also possessed the same until his conveyance to *Lee*. And also gave in evidence, that *Russell Lee*, the grandson and heir at law, died without having issue, and leaving *Sarah Russell Contee*, *Ann Lee*, *Eleanor Benson* and *Margaret Clerklee*, the wife of the defendant, his heirs at law. The defendant then prayed the opinion of the court, and their direction to the jury, that if they find the several facts as stated by the defendant to be true, that then, although they find the facts stated by the plaintiff to be true, they may and ought to presume a patent issued for *Beall's Reserve*, and as contained in the before mentioned deed from *Beall* to *Ranton*; and if they find the location of the deed as made by the defendant to be true, that then they ought to find a verdict for the defendant.

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This opinion and direction the Court, [*Key and Clarke, As J.*] gave to the jury. The plaintiff excepted.

2. The plaintiff then prayed the opinion of the court, and their instructions to the jury, that the evidence in this cause was insufficient to justify the jury in presuming that a grant was issued to *Ninian Beall* for *Beall's Reserve*. But the court refused to give such instructions. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, and EARLE, J.

*Key, Shaff and Magruder*, for the Plaintiff, contended, that there was no case where the court had directed the jury to presume a grant where there had been no certificate of survey, composition paid, and possession held under it. They referred to *Hull's Lessee vs. Gough*, 1 *Harr. & Johns*. 119. *Cockey's Lessee vs. Smith*, ante 20; and *Kelly's Lessee vs. Greenfield*, 2 *Harr. & M'Hen*. 121.

*Martin*, for the Appellee, cited *Lloyd vs. Gordon*, 2 *Harr. & M'Hen*. 254. *Carroll, et al. Lessee vs. Norwood*, 4 *Harr. & M'Hen*. 287. *S. C.* 5 *Harr. & Johns*. 155; and *The Mayor of Kingston upon Hull vs. Horner*, 1 *Cowp.* 102.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that the court below erred in directing the jury to presume a patent issued for *Beall's Reserve*, as contained in the deed from *Beall* to *Ranton*; on the facts and circumstances stated by the defendant.

The court are of opinion, that to lay a foundation for the court to direct the jury to presume a patent from the Proprietary to any person, it is necessary to show an incipient title from the Proprietary; that is an equitable interest derived from the Proprietary by a located warrant, and payment of the composition; or a certificate of survey on a common or other warrant, and payment of the composition, and a length of possession consequent on such equitable interest in the person acquiring the same, and those claiming under him.

In this case it appears that the origin of the defendant's title to *Beall's Reserve*, is the deed from *Ninian Beall* to *James Ranton*, and that all the facts and circumstances

subsequent to the date of the said deed, with the possession in *Richard Lee*, and those claiming under him, are deducible from the same source—the deed from *Beall* to *Ranton*,—and in that manner may be accounted for. *Richard Lee*, and those claiming under him, were intruders on the Proprietary, and their possession tortious, consequently the defendant can derive no aid from such possession, as a constituent part of the grounds on which the prayer to the court to direct the jury to presume a patent issued for *Beall's Reserve*, was founded.

The court dissent from the opinions of the court below in both the bills of exceptions.

JUDGMENT REVERSED, AND PROCEEDENDO AWARDED.

### RENCH VS. BELTZHOVER.

DECEMBER.

APPEAL from a judgment rendered in *Washington County Court*, in favour of the plaintiff, (now appellee,) in an action of trespass *quare clausum fregit*. The close was called *Contention*. The general issue was pleaded, and plots were made.

1. At the trial the plaintiff offered in evidence the patent for a tract of land called *Long Meadow Enlarged*, granted to *Daniel Dulany* the 5th of November 1751, reciting that *Thomas Cresap* had, on the 16th of June 1739, granted him a tract of land called *Long Meadows*, containing 550 acres; and had, on the 30th of June 1742, granted him another tract of land called *The Addition to Long Meadow*, for 110 acres; and had, on the 8th of August 1743, granted him another tract called *The West Addition to Long Meadow*, containing 100 acres, &c. That the said tracts were resurveyed by the said *Dulany*, and a certificate thereof returned, dated the 1st of August 1746, reducing the whole into one tract called *Long Meadow Enlarged*, beginning at the original beginning tree of *Long Meadow*, and running 69 courses viz. S 12° W 62 perches, then W 584 perches, then N 10° W 106 ps. N 46° W 104 ps. N 70° W 64 ps. &c. containing 2131 acres of land. He also read in evidence the patent for *The Resurvey on Dawson's Strife*, granted to *Peter Rench* the 17th of June 1757, stating that the said *Rench* was seized in fee simple of a tract of land called *Strife*, originally, on the 7th of August 1739, granted to one *Edward Dawson* for 150 acres, &c. That the said tract was

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Parol evidence is admissible to prove that a tract of land has acquired a name by reputation, different from its patent name, and a reference to it by its acquired name in a subsequent grant, by way of call, is a good and legal reference.

It is the province of the court to determine on the true construction and operation of grants, and whether a call in a grant is to be gratified or not, and in what manner, and of the jury to find facts, and ascertain the true place called for in a grant, according to the evidence.

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resurveyed by the said *Rench*, and a certificate thereof returned dated the 6th of October 1752, and the tract called *The Resurvey on Dawson's Strife*, beginning at the original beginning tree, and running 101 courses; the 21st course whereof is as follows, viz. then  $N 72^{\circ} W 170$  perches to the end of 226 perches on the second line of a tract of land called *Long Meadow*, and running with said land  $W 358$  perches,  $N 10^{\circ} W 106$  ps.  $N 46^{\circ} W 140$  ps.  $N \&c.$  containing 2345 acres of land. He also offered in evidence the patent of a tract of land called *Contention*, granted to *George Beltzhoover* on the 11th of October 1805, surveyed under a special warrant on the 9th of May 1804, beginning at the end of the 2d line of *Long Meadow Enlarged*, granted to *D. Dulany*, and running with said line  $E 375\frac{1}{2}$  ps. to the 45th or  $S 64^{\circ} E 162$  ps. line of *Long Meadow Enlarged*, granted to *Henry Boquet*, and with said line  $S 64^{\circ} E 4$  ps. to the fourth line of *Continuation of Friendship*, and with said line reversed,  $W 8$  ps. to the end of the 3d line of said land, and reversing said line  $S 59\frac{1}{2}^{\circ} E 147$  ps.  $S 70^{\circ} W 4\frac{1}{2}$  ps. to the end of the  $N 50$  ps. line of *The Resurvey on Dawson's Strife*,  $N 72^{\circ} W 170$  ps.  $W 330$  ps. thence by a straight line to the beginning, containing 81 acres. Also the patent of a tract of land called *Long Meadow*, granted to *Thomas Cresap* on the 16th of June 1739, beginning at a bounded red oak standing on the west side of *Neal's Meadow*, below the mouth of a drain that comes out of a great pond being in the said land, and running thence  $N 75^{\circ} W 200$  perches, then  $N 21^{\circ} W 140$  perches, then, &c. containing 550 acres of land. Also the patent of a tract of land called *Continuation of Friendship*, surveyed on the 3d of July 1770, and granted to *Samuel Hughes* on the 2d of January 1771, beginning at the end of 10 ps. in the 15th line of *The Resurvey on Dawson's Strife* granted to *Peter Rench* the 17th June 1757, and running thence  $N 72^{\circ} W 104$  perches,  $S 70^{\circ} W 82$  ps.  $N 59\frac{1}{2}^{\circ} W 147$  ps.  $E 35$  perches,  $S 64^{\circ} E 108$  ps.  $N 70^{\circ} E 82$  ps.  $S 72^{\circ} E 106$  ps. then with a straight line to the beginning, containing 51 acres of land. Also the patent of a tract called *Downey's Lot*, surveyed on the 1st of October 1742, and granted to *Robert Downey* on the 13th of July 1743, beginning at a bounded walnut standing in a glade about a quarter of a mile from the said *Downey's* house, and running thence  $S. 66^{\circ} W. 60$  ps. then  $N. 70^{\circ} W. 20$  ps. then

N. 26° E. 100 ps. then N. 50 ps. then N. 70° E. 82 ps. then by a straight line to the beginning, containing 50 acres. He then proved the trespass complained of; and gave in evidence the plots, explanations, and his locations, and proved that such locations were true. The defendant then offered in evidence the patent before mentioned of *Long Meadow*, granted to *Thomas Cresap* the 16th of June 1739. Also the patent of *Long Meadow Enlarged*, granted to *Henry Boquet* the 16th of September 1763, reciting that he was seized by purchase of and in a tract or parcel of land called *Long Meadow*, lying, &c. originally on the 5th of November 1731 granted unto *D. Dulany* for 2151 acres. That on the 9th of June 1752, *Dulany* obtained a special warrant to resurvey the said tract, with liberty to include any contiguous vacancy. In pursuance of which a resurvey was made, and the certificate thereof returned into the land office; by which it appeared there was the quantity of 2370 acres of vacant land added, which certificate of resurvey the said *Boquet* purchased. That the lines of the resurvey interfering with other lands, covenants had been entered by different persons against patent issuing thereon; that *Boquet* being willing and desirous to settle and adjust the said disputes, prayed a special warrant to resurvey the aforesaid tract of land called *Long Meadow*; with liberty to correct, &c. warrant accordingly issued 16th April 1763, and certificate of survey dated the 7th of May 1763 returned, called *Long Meadow Enlarged*. Beginning, for the outlines of the resurvey of the whole, at the beginning tree of a tract of land called *Downay's Contrivance*, taken up by *William Downey*, and which said beginning tree does stand N. 82° E. 26 ps. from the end of the 55th line of the original of this present resurvey, and running thence N. 88½° W. 361 ps. S. 15° W 46 ps. &c. containing 4163 acres of land. Also the patent of *Long Meadow Enlarged*, granted to *Daniel Dulany* on the 5th of November 1751, as before mentioned. Also the patent for *The Resurvey on Dawson's Strife*, granted to *Peter Rench* on the 17th of June 1757, and also before mentioned. The defendant then offered parol testimony to prove that the tract called *Long Meadow Enlarged* was known in the country before the original survey of *The Resurvey on Dawson's Strife*, and was also called in the proceedings in the land office by the name of *Long Meadow*, and

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had acquired that name by reputation before the said original survey of *The Resurvey on Dawson's Strife*. The plaintiff objected to this evidence on the ground, that it tended to vary or contradict the call in the 21st line of *The Resurvey on Dawson's Strife*, and prayed the opinion of the court, and their direction to the jury, that there was no ambiguity on the face of the certificate and grant in the call of the 21st line of *The Resurvey on Dawson's Strife* to *Long Meadow*; and that no parol or other proof could be admitted to vary or contradict the grant as to that call, and that the jury were bound to go to the point called for, if it was possible to do so, and if impossible to gratify that call, that then the same must be rejected, and the course and distance adhered to with or without correcting variation. The Court [*Shriver*, A. J.] sustained the objection, and gave the direction to the jury as prayed. The defendant excepted, &c.

2. The defendant then prayed the opinion of the court, that if the jury were of opinion from the evidence that *Long Meadow Enlarged*, located on the plots, was generally known in the neighbourhood by the name of *Long Meadow*, at the time *The Resurvey on Dawson's Strife* was taken up, and had also been referred to by said name in proceedings of the land office, and in other patents, and particularly in the patent of *Long Meadow Enlarged* granted *Henry Boquet*, and that the call in *The Resurvey on Dawson's Strife*, to the second line of *Long Meadow*, was meant and intended to be the second line of *Long Meadow Enlarged*, that then the jury might so find, and regulate their verdict accordingly. But the court refused to give this opinion prayed by the defendant, because no ambiguity appearing on the face of the grant of *The Resurvey on Dawson's Strife*, no evidence *de hors* the grant could be admitted to control or vary the call expressed in its 21st line; but were of opinion, and so directed the jury, that if the jury found there was no such point as was called for in that line, then said line must be run the course and distance expressed in the grant, with or without variation. The defendant excepted.

5. The defendant then prayed the court to direct the jury, that it was a matter proper to be decided by the jury, whether the call in *The Resurvey on Dawson's Strife*, to the end of 226 perches on the second line of *Long Meadow*, and running with the said land, was a call possible

to be gratified or not. The court refused to give the direction; but were of opinion, and instructed the jury, that if they found there were not 226 perches in the second line of *Long Meadow* called for in the grant of *The Resurvey on Dawson's Strife*, that in law the call could not be gratified, and they must run course and distance as to that line, with or without variation. The defendant excepted.

4. The defendant then prayed the court to direct the jury, that the call in the 21st line of *The Resurvey on Dawson's Strife*, to the end of 226 perches on the second line of *Long Meadow*, and with said tract, was a call to *Long Meadow*, although there were only 140 perches, not 226 perches, in the second line of *Long Meadow*, and that the jury might locate *The Resurvey on Dawson's Strife* so as to run the twenty-second line of said land with *Long Meadow*. But the court refused to give this direction, being of opinion that the 22d line was a dependent location of the 21st, and must commence where the 21st ended; and that if the call in the 21st line could not, under the opinion of the court already given, be gratified, that then the 22d must commence and run from where the jury should find the 21st ended, according to the course and distance, with or without variation. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J. by

*Martin*, for the Appellant; and by  
*Key*, for the Appellee.

They referred to *Smith's Lessee vs. Volgamot & White*, 2 Harr. & M'Hen. 155. *Webb's Lessee vs. Beard*, 1 Harr. & Johns. 349; and *Carroll et al. Lessee vs. Norwood*, in this court, at December term 1812 (a).

CHASE, Ch. J. delivered the opinion of the court. On the first bill of exceptions. The court are of opinion, that the learned judge below erred in refusing to admit parol evidence to go to the jury, to prove that the tract of land called *Long Meadow Enlarged*, granted to *Daniel Dulany* on the 5th of November 1751, was known, and had ac-

(a) See 5 Harr. & Johns. 163.

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quired the name, by reputation, of *Long Meadow*. The court being of opinion, that *Long Meadow Enlarged* was capable of acquiring the name of *Long Meadow* by reputation, and the reference to it by way of call was a good and legal reference; and if the jury found that *Long Meadow Enlarged* was known, and had acquired by reputation the name of *Long Meadow*, they were bound, in locating *The Resurvey on Dawson's Strife*, to run the 21st course of that tract, to wit, N 72° W. 170 ps. to the termination of 226 perches on the second line of *Long Meadow Enlarged*, and the subsequent courses specified in *The Resurvey on Dawson's Strife*, accordingly.

The court dissent from the opinions expressed by the court below in the *first* and *second* bills of exceptions.

On the *third* bill of exceptions. The court are of opinion, that it exclusively belongs to the power and jurisdiction of the court to determine on the true construction and operation of grants, and whether a call in a certificate of survey is to be gratified or not, and in what manner; and that it exclusively appertains to the province of the jury to find facts, and ascertain the true place or point called for, according to evidence legally admissible by the court.

The court concur with the court below in refusing to give the directions prayed in the *third* and *fourth* bills of exceptions:

JUDGMENT REVERSED.

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DORSEY VS. COURTENAY, *et al.* Lessee.

APPEAL from *Baltimore County Court*. Ejectment on the demise of *John Skinner* for lot No. 38, in the city of

T D in 1768 executed a deed of trust to M and H, in which they were authorised, amongst other things, to convey to C S a lot of ground No. 38, in payment of a debt due from T D to C S, in case he, C S, consents to accept and receive said lot in satisfaction of said debt, within six weeks from the date of the deed. On the 20th of September 1790, the chancellor, on behalf of the state, conveyed the lot to M and H, reciting in his conveyance that the commissioners of confiscated *British* property sold the lot to J D, who sold and conveyed it to T D, and that T D had conveyed it to M and H, &c. J D, L W, S C and T D, in 1782, executed 23 bonds to the state, under the act of May 1781, ch. 23, for property purchased by them of the state. J D, with T D and E N his sureties, in 1781 passed their bond to the state, and which was released by the state to E D, the executrix and devisee of J D, by the act of 1791, ch. 54. Process issued in 1788, in conformity to the act of May 1781, ch. 33, on the 23 bonds executed by J D, and others, in 1782. T D died in 1790, and by his will devised his whole estate, real and personal, to E D, whom he also appointed his executrix. T D died insolvent, without leaving sufficient property to pay his debt due to the state; and J D, L W and S C were insolvent, and were regularly discharged under the insolvent law after the date of the bonds, and before the death of T D. In 1790 the legislature, by a resolution directed the treasurer to cancel all bonds given to the state by J D, E N and T D, and by J D, L W, S C and T D. By the act of 1791, ch. 54, the legislature declared that their intention, by the above resolution, was to benefit E D, and her children, and not the creditors of T D, or any other person, and they repealed the resolution, and directed the treasurer to receive the bonds, and to deliver them to E D, to her use, after having acknowledged and endorsed on each bond satisfaction received by the state from her for the sum due on each bond; and that she should stand, in law and equity, in the place of the state. The act was complied with by the treasurer. Under the will of T D, and the assignment of the bonds, E D entered into possession of lot No. 38. C S, in the deed of trust mentioned,

*Baltimore*, described by metes and bounds. Pending the suit *Skinner* died, and *Hercules Courtenay*, and others, his devisees, were made parties in his stead. The general issue was pleaded.

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1. At the trial the plaintiff gave in evidence, that *Thomas Dorsey*, deceased, was in his life time seized in fee of the premises in the declaration mentioned, and while so seized made a deed of conveyance, regularly executed, acknowledged and recorded, dated the 12th of August 1788, to *Archibald Moncrief* and *William Hammond*, reciting that said *Dorsey* being indebted to certain persons in sundry sums of money, was desirous to secure the payment of them, and had agreed to execute said deed. He therefore granted, &c. to *Moncrief* and *Hammond*, said lot, &c. and that *Moncrief & Hammond*, and their heirs, should have full power and authority, at all times thereafter, to convey and make over, by a good and sufficient deed or deeds in law, to *Clifford*, &c. and his heirs, for ever, &c. all that part of the lot of ground above described, situate in *Baltimore* town, &c. in payment and satisfaction of two bills of exchange, &c. provided *Clifford* consents to accept of and receive the said part of a lot, &c. as a compensation for the said money due on the said two bills, within six weeks from the date thereof, &c. Also that *Moncrief & Hammond*, and the survivor of them, and their heirs, should have full power, &c. at any time to make over and convey by a good deed, &c. to *Charles Stewart*, his heirs and assigns, part of the said lot, &c. in payment and satisfaction of the sum of, &c. due to the said *Stewart*, provided the said *Stewart* consents to accept, &c. The plaintiff further proved, that *Charles Stewart*, in the deed mentioned, was the person mentioned in the record of certain proceedings in the court of chancery herein after set forth, and was the surviving executor of *James Dick*; and that the lot of ground, in the said deed mentioned, as conveyed for the use of *Charles Stewart*, was the one for which the ejectment was brought. He also read in evidence a deed duly executed, acknowledged and recorded, from the chancellor of this

brought suit against T D for the debt due to him, and recovered judgment in 1788. He sued out a writ of *scire facias* hereon against E D, as executrix of T D, and obtained a fiat in 1794. C S in 1794 filed a bill in chancery against M and H, to compel them to execute the trust, by conveying to him the lot No 3, and a decree passed for that purpose—*Held*, that the record and decree could not be read in evidence in an action of ejectment brought by J S's lessee against E D, for the recovery of the said lot, *Held also*, that the decree of the chancellor, together with the deed from M and H to J S, the lessor of the plaintiff, and the assignee of C S, was not sufficient evidence of a due execution of the trust in the deed from T D to M and H.

In this case the lessor of the plaintiff died pending the suit, and his devisees, claiming undivided parts of the land in dispute, were made parties.

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state to the said *Moncrief* and *Hammond*, dated the 20th of September 1790, reciting that the commissioners for the sale of confiscated *British* property sold lot No. 38, in *Baltimore* town, to *John Dorsey*, who sold and conveyed the same to *Thomas Dorsey*; that *Thomas Dorsey* had conveyed, &c. to *Moncrief & Hammond*, &c. The defendant then gave in evidence, that *Thomas Dorsey*, in his life-time, together with *John Dorsey*, *Luke Wheeler* and *Samuel Chase*, did, on the 4th of February 1782, pass their bonds, payable to the *State of Maryland*, for the principal sum of £8140 0 0, payable in bills of credit issued in pursuance of the act of assembly in such case made and provided; which said bonds were taken in virtue of the act of May session 1781, *ch.* 33, for property sold under that act. That *John Dorsey*, with *Thomas Dorsey* and *Edward Norwood*, securities, passed their bond to the state of *Maryland* for the principal sum of £1379, which bond was released to *Elizabeth Dorsey*, the defendant, the executrix and devisee of *Thomas Dorsey*, agreeably to the following statement of account by *T. Harwood*, treasurer of the western shore, charging confiscated property sold, and interest due on the bonds given therefor, crediting payments, &c. and also crediting, on the 16th of December 1790, by confiscated property, for bonds cancelled agreeably to a resolution of the general assembly of this date, (28th of December 1791,) £1397. "The above bonds of £1379 principal, received of *Eliza. Dorsey*, and delivered to her again, with the following endorsement—satisfaction received by the state from *Eliza. Dorsey* for the sum due on this bond, this 16th of December 1790—and I have delivered the said bonds to the said *Eliza. Dorsey*, to her use, according to an act, entitled, "An act for the relief of *Elizabeth Dorsey*, executrix of *Thomas Dorsey*, late of *Anne Arundel* county," passed December 23d 1791." She further gave in evidence, that such process was issued on the said bonds from the general court, and such proceedings were had therein from time to time, as are specified in the clerk's certificate, showing that process issued on 23 bonds executed to the state by *John Dorsey*, *Luke Wheeler*, *Samuel Chase*, and *Thomas Dorsey*, on the 4th of February 1782, for £8140, which said proceedings were in conformity to, and by virtue of, the act of May session 1781, *ch.* 33. She further gave in evidence, that the said

*Thomas Dorsey* died sometime in the year 1790, having first made his will, dated the 14th of March 1790, whereby he devised his whole estate, real, personal and mixed, after payment of his debts, to his wife *Elizabeth Dorsey*, and appointed her his executrix, &c. She further gave in evidence, that the said *Thomas Dorsey* died insolvent without leaving sufficient property, real and personal, to pay his debt due to the state; and that *John Dorsey*, *Luke Wheeler* and *Samuel Chase*, were insolvent, and regularly discharged under the insolvent law after the date of the said bonds, and before the death of the said *Thomas Dorsey*, and never discharged any part of the said debt to the state. She further gave in evidence, that the general assembly, at November session 1790, passed the following resolution in her favour. "Whereas the resolution of this session in favour of *Elizabeth Dorsey*, executrix of *Thomas Dorsey*, is defective, and does not sufficiently express the meaning and intention of the legislature—Resolved. That the treasurer of the western shore be and he is hereby authorised and directed, to cancel all bonds now in the treasury, whereon any balance may be due, given to the state by *John Dorsey*, *Edward Norwood* and *Thomas Dorsey*, and by *John Dorsey*, *Luke Wheeler*, *Samuel Chase* and *Thomas Dorsey*." She also gave in evidence, that at November session 1791, the general assembly passed an act, entitled, "An act for the relief of *Elizabeth Dorsey*, executrix of *Thomas Dorsey*, late of *Anne Arundel* county, deceased," reciting, that "the general assembly, at their last session, did by their resolution authorise the treasurer of the western shore to cancel all bonds then in the treasury, whereon any balance was due, given by the aforesaid *Thomas Dorsey*, and other persons in the said resolution mentioned; and it was the intention of the general assembly by the said resolution to benefit the said *Elizabeth Dorsey*, and her children, and not the creditors of the said *Thomas Dorsey*, or any other persons whatsoever; and the same is not sufficiently expressive of the sense and intention of the legislature; and doubts having arisen whether the said resolution can be of benefit to her or her family; and all the said bonds are yet uncanceled, and the said resolution has not been carried into effect; and this general assembly being desirous and willing to carry the intention of the legislature into full effect, Be it enacted, &c. that the said re-

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resolution be and the same is hereby repealed, and the treasurer of the western shore is hereby authorised and directed, to receive the said bonds, and deliver them to the said *Elizabeth Dorsey*, to her use, after having acknowledged and endorsed on each bond, satisfaction received by the state from the said *Elizabeth Dorsey*, for the sum due on each bond at the date of the said resolution; and the said *Elizabeth Dorsey* shall stand, in law and equity, in the place of the state, and be entitled to retain in her hands, in her own right, the money due to the state from the said *Thomas Dorsey*, at the time of passing the before recited resolution; provided that the said *Elizabeth Dorsey* shall not, in virtue of this act, be entitled to ask, demand, sue for, recover or receive, the amount or value of the said bonds, or any part of them, of, or from, any of the co-obligors in the said bonds, their heirs, executors or administrators." She further gave in evidence, that under and by virtue of the said act of assembly, the treasurer of the western shore did deliver up to her the said *Elizabeth Dorsey*, the defendant, all the said bonds, with such endorsement on each bond as is herein before mentioned. That in pursuance of the will of the said *Thomas Dorsey*, and under the assignment aforesaid of the said bonds and debt from the state, she, the defendant, did immediately enter into the possession of the said lands mentioned in the declaration, and had been ever since in possession of the same, claiming right thereon. She further gave in evidence, that *Charles Stuart*, in the deed of trust mentioned, prosecuted a suit against said *Thomas Dorsey* for the debt aforesaid due by him to said *Stuart*, and obtained a judgment therefor in the general court at October term 1788, upon which he sued forth a writ of *capias ad satisfaciendum* against *Thomas Dorsey*, returnable to October term 1789, to lie in the office; and did further sue forth another writ of *capias ad satisfaciendum* thereon against the said *Thomas Dorsey*, returnable to May term 1790, to which no return was made by the sheriff; and did further sue forth to October 1791, a writ of *scire facias* against the said *Elizabeth Dorsey*, executrix of the said *Thomas Dorsey*, to revive the said judgment against her as executrix aforesaid, and did so prosecute said writ of *scire facias* as that a judgment thereon was obtained at May term 1794. The plaintiff having produced no other evidence, than that which is herein after mention-

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ed, to prove that the said *Charles Steuart* had accepted the said premises in the declaration mentioned, according to the terms of the said deed of trust, then further to prove the title under the said deed of trust, he offered to read in evidence the proceedings in the court of chancery, on a bill filed by *Charles Steuart & James M. Culloch*, surviving executors of *James Dick*, against *Archibald Moncrief & Wm. Hammond*, on the 14th of August 1794, setting forth that *Thomas Dorsey*, being indebted to the said *Steuart & M. Culloch*, executed to them two bonds, &c. the same being for property belonging to the estate of *James Dick*, sold by the said executors; suits were brought thereon, and judgments recovered. That the said *Dorsey* executed a deed of trust to the said *Moncrief & Hammond*, &c. That in virtue of said deed the said trustees, to pay and satisfy the judgments aforesaid, were authorised and empowered to convey to the said *Charles Steuart & James M. Culloch*, in fee, that part of the said lot, &c. provided the same was accepted by the said *Steuart & M. Culloch* in full satisfaction of the money due as aforesaid. That no other sums of money than the amount of the judgment aforesaid, were due to the said *S. & M. C.* from the said *Dorsey*, or *Dorsey, Wheeler, & Co.* and that the name of the said *Steuart* was alone mentioned in the deed as being a person of more business than the other two co-executors. That the said *Steuart*, by his attorney, sometime after the execution of the said deed, accepted and agreed to take the said part of the lot aforesaid, as expressed in the deed, and offered in consideration and satisfaction of the said judgment; and the said *Dorsey* was pleased therewith, and begged that no execution on the judgments might be served on him or his property, and in consequence none ever was served. That after the judgments and deed aforesaid, the chancellor, in order to carry the trusts into full effect and operation with the consent of the said *Dorsey*, conveyed an estate in fee to the said trustees of the said lot. The trustees refuse to convey, &c. The answers of *Moncrief* and *Hammond* stated, that they were willing to execute the trust in the manner the chancellor shall direct, &c. Decreed, the 24th of August 1801, that the defendants convey by deed, &c. to the complainants, all that part of a lot, &c. No. 58, in full satisfaction of all claim, &c. by the complainants against the defendants. To this evi-

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dence the defendant objected. But the Court, [*Nicholson*, Ch. J. and *Hollingsworth*, A. J.] overruled the objection, and permitted the said record and decree to be read in evidence to the jury. The defendant excepted.

2. The plaintiff then read in evidence a deed, made under the decree of the chancellor, dated the 21st of October 1801, from *Moncrief* and *Hammond*, to *John Skinner*, reciting the decree of the court of chancery, and an assignment of *James McCulloch's* right, &c. dated the 18th of September 1801, to the said *Skinner*. The facts stated in the deed were admitted to be true. The defendant then prayed the court to direct the jury, that the said evidence, if they believed it, was not sufficient or competent to prove the acceptance by *Charles Stewart* of the said lot so conveyed in trust for his use, in satisfaction of the debt in said deed mentioned, within six weeks from the date of said deed, according to the terms thereof. But the court were of opinion, that the decree of the chancellor, together with the deed from *Moncrief & Hammond* to *John Skinner*, was sufficient evidence of a due execution of the trust in the deed of the 12th of August 1788. The defendant excepted.

3. The plaintiff then gave in evidence, that *John Skinner* died since the institution of this suit, having first duly made his last will and testament, dated the 5th of February 1806, whereby he devised all the rest, residue and remainder, of his estate, both real and personal, not before disposed of, whatsoever nature or kind the same may be, in manner following, viz. The one equal moiety or half part thereof to *Elizabeth Rogers* and *Ann Rogers*, their heirs and assigns, and the other equal moiety to *Hercules Courtenay*, his heirs and assigns, for ever. And that *Elizabeth Rogers*, who hath since intermarried with *Robert Maxwell*, *Ann Rogers* and *Hercules Courtenay*, are the residuary devisees in said will, and are the persons made parties in this cause. The defendant then moved the court to direct the jury, that upon the whole evidence the plaintiff was not entitled to recover. But the court refused to give the direction. The defendant excepted; and the verdict and judgment being against her, she appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J. by

*Martin* and *T. Buchanan*, for the Appellant; and by  
*Harper*, for the Appellee.

CHASE, Ch. J. delivered the opinion of the court, dissenting from the opinions expressed by the county court in all the bills of exceptions.

JOHNSON, J. dissented and delivered the following opinion. In this case the lessors of the plaintiff and defendant claim under the same person, *Thomas Dorsey*, the latter under a bond executed by *Dorsey* in the year 1782, the former under a deed executed by him in the year 1788.

The bond was to the state of *Maryland*, and under an act of assembly gave to the state a lien on the land in question, and that bond having been transferred by the state, under another act of assembly, to the defendant, and that act having vested in her all the interest the state had, (so far as regards the land in controversy,) she became entitled to the lien on the property.

The deed executed in 1788, conveyed several tracts of land, including the lands in contest, to trustees, for the benefit of certain specified creditors, provided they within six weeks from the date of the deed, assented to receive the trusts raised for their benefit, in full satisfaction of their claims, and if not so received, then the trustees were to hold the property, subject to the control of the grantor.

It appears to be conceded on the part of the plaintiff, that the persons for whose use those original trusts were created, were not to have the benefit of them, except upon their timely assent thereto, and the consequent release of their claims. It would therefore appear to follow, that the plaintiff, claiming under one of those creditors, should establish the due assent and release of that creditor, before he can derive any benefit under the deed. To establish that fact, or to preclude the necessity of its establishment, he produced in evidence a bill filed in chancery by one of those creditors, against the trustees named in the deed, for the conveyance of the land in question, with the proceedings, and the decree passed thereon, directing such conveyance to be made. The bill was filed, and the decree obtained long after the expiration of the six weeks.

By the decree the land was directed to be conveyed to the complainant, but he having assigned the decree to the person under whom the plaintiff claims, prior to the con-

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*Dorsey*  
vs  
*Courtenay*

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*Dorsey*  
vs  
*Gourtenay*

veyance, the conveyance was made to that person, and not to the complainant.

There is no evidence in the cause to establish the assent and release, except the proceedings in chancery have that effect, nor is there any thing to exclude the defendant, (claiming indirectly from *Thomas Dorsey*,) from demanding such proof, unless the proceedings in chancery and the deed will do so. The questions then arise, are the proceedings in chancery evidence of those facts? and if not, do they dispense with such proof? and if so, then will the deed made, not to the complainant in the cause, but to his assignee, transfer to him the legal title?

The proceedings in chancery having taken place in a cause in which the defendant was no party, cannot be received to establish any one fact necessary to be proved in this cause, and therefore it appears the court below erred in permitting them to go in evidence to prove the assent and release to have been obtained in due time. But although the court have erred, yet if the proceedings supercede the necessity of such proof, the judgment below having been in favour of the plaintiff, such error of itself presents no foundation for the reversal of that judgment.

The trustees were not authorized of themselves, to make the conveyances, except on the terms of the trust deed; and yet as the legal title was in them, there it must remain until parted with, even after the expiration of the time specified in the deed, and it is not perceived how they were to be deprived of that legal title, except by a conveyance, or something equivalent thereto. It may, and to me seems to follow, that therefore a conveyance by those trustees to the creditors, even if voluntarily made, without the timely assent and release of their debts, would have vested the legal estate in such creditors. The only effect would have been, that if the assent and release had existed, then the creditors would have had the legal estate, free from all trusts, if not, then subject to the future trusts of the grantor created by the deed.

To me, then, it appears to follow, that the person, to whose use the trustees did convey, holds the legal estate which they had, unless they were divested of the same by the decree, directing the conveyance to the complainant, in the suit in chancery, and not to his assignee.

The question then becomes important, did the decree of itself, or by the delay alleged, pass the estate?

Before the act of 1785, *ch. 72*, there was no mode to compel a conveyance under a decree directing it to be made, provided the person would withstand all the process of the court, such person, although deprived by the decree of the equitable estate, could not be divested of the legal one. The design of the legislature was to apply a remedy, and that was, by directing that the decree in certain cases should pass the legal estate. The legislature might, if they had thought proper, have directed, that the decree in all instances should have had effect; nor does it appear to me that any good reason can be offered, why such was not its provision; but such a construction of it, it appears evident to me, does not comport either with its letter or spirit. If the decree of itself, in all instances, passed the estate, then the deed, which the act directs to be executed, even when executed, could have no effect, for if the decree passed the estate, nothing remained for the deed to operate on. The legislature then designed, that subsequent proceedings should be had, to give to the decree the operation of a conveyance, and as the defendant could not refuse to convey, until the conveyance was demanded, therefore the demand was necessary, as he could not be charged with neglecting to convey, until asked to convey, the demand therefore must precede the charge of neglect.

Such I have always understood to have been the construction of the act of 1785, and indeed I am not sure that the demand must not appear by proof in the court of chancery, and that the refusal or neglect must appear by a subsequent order, or decree of the chancellor, before the conveyance of the legal estate was perfected.

It has been asked, where would be the legal estate if the defendant should die after the decree, and before the conveyance? If I am correct, it would be in his heir, and it would only be a common case, of the legal interest being in one, and the equitable one in another, and in the same manner as if after a sale of land, and before the conveyance, the person who sold it should have died, his heir would have the legal estate, and the purchaser or his representative, the equitable one, it would be one of those casualties, for which perhaps it is impossible to provide.

1814.

*Dorsey*  
vs.  
*Courtenay*

1814.

Bell  
vs  
Brown

From these remarks then, my opinion is, that the court erred in permitting the proceedings in chancery to go in evidence to prove particular facts, but that they, and the deed by the trustees to the assignee of the complainant, were proper evidence to make out the title of the person under whom the plaintiff claims.

I therefore differ in opinion from the court below, on the second bill of exceptions, but as that was pronounced upon irrelevant matter, and not affecting the plaintiff's right who obtained the judgment, that judgment ought to be affirmed.

The prior lien of the bond can have no effect on the legal right to the land, the lien did not divest that legal right, and that having been transferred, to the lessors of the plaintiff, he was entitled to recover, still (perhaps) holding, it subject to the defendant's prior equitable right.

JUDGMENT REVERSED, AND PROCEEDENDO AWARDED.

DECEMBER.

BELL vs. BROWN's Adm'r.

Where lands, which had been mortgaged, were decreed to be sold on a bill filed in chancery by the mortgagee, and such lands were sold, the proceeds of the sale, if there is a judgment against the mortgagor prior to the mortgage, is first to be applied to the payment of such judgment, that having a preference to the claim of the mortgagee

APPEAL from a decree of the Court of Chancery. The chancellor's opinion sufficiently states the case.

KILTY, Chancellor, (July term 1810.) A bill of revivor has been filed by the complainant, (now appellee,) on a bill filed the 4th of September 1806, by his intestate, against the present defendant, (now appellant,) and *N. Brewer*. The object of that bill was to have the contract annulled between *Brown* and the defendant *Brewer*, who had sold to him the property in question, under a decree of this court in a suit by the defendant, *Bell*, against a certain *W. Brown*, on a mortgage held by the said *Bell*. It will be seen, from the proceedings in that suit, that a claim was made by *B. Ogle* on a judgment prior to the mortgage, which claim the complainant's intestate had procured an assignment of, and which he had claimed the benefit of, and was about to make use of at law until restrained by an injunction from this court. From the answer of *Bell*, and the agreement of June 1810, it appears that the whole case is submitted, and the interests of the several parties are to be determined.

By the counsel for *Bell* it is contended, that *Ogle* lost his claim by his own negligence, and that the complain-

ant's intestate, having purchased at the sale by *Brewer*, the trustee, with a knowledge of that claim, ought not to be allowed any deduction on account thereof, supposing it to be valid. But the chancellor is of opinion, that the claim of *B. Ogle* was entitled to a preference, and that it is now before the court to be considered in the same manner as if he had been a party to the original bill. *Decreed*, that (the contract not being annulled as is therein prayed,) the injunction heretofore issued be perpetual. *Decreed* also, that the claim of the complainant on the judgment assigned by *B. Ogle* have a preference to the claim of the mortgagor, *Bell*, out of the proceeds of the sale made by the trustee, *Brewer*. From this decree the defendant, *Bell*, appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, and MARTIN, J. by

*Martin*, for the Appellant; and by  
*Magruder*, for the Appellee.

DECREE AFFIRMED.

### WEST VS. J. & B. JARRETT.

DECEMBER.

APPEAL from a decree of the Court of Chancery. The bill of the complainant, (now appellant,) filed on the 27th of January 1806, stated that a tract of land called *Norfolk* was surveyed for one *Mooberry*, and the certificate thereof assigned to the complainant on the 2d of September 1794. That *J. Jarrett*, one of the defendants, (now one of the appellees,) claiming title to the land, the complainant filed a bill against him for relief in equity. The proceedings on that bill was set out as in *West vs. Jarrett*, 1 *Hurr. & Johns*. 538. The bill further stated, that *J. Jarrett*, and *B. Jarrett*, the other defendant, (and the other appellee,) have been in possession of the land ever since the year 1785, and cut down and used the timber therefrom, and taken the rents and profits until the time of executing the deed from *J. Jarrett* to the complainant, but whether they took the profits jointly or separately, the complainant could not tell. That immediately after the reversal of the decree, the complainant obtained possession of the land,

D W filed a bill in chancery against J J, to preclude him from obtaining a grant for a tract of land, within the lines of the survey of which D W claimed land, and in 1804 by decree, J J was decreed to convey to D W the land so claimed by him. D W afterwards in 1806, filed a bill against J J and B J, who had been in possession of the land since 1785, for an account of the wood and timber cut off by them, and for the rents and profits. J J and B J in their answer, stated that they had made considerable improvements on the land, more than the value of the rents and profits, for which they claimed to be allowed, and they relied on the new

bar to an account. *Held*, 1. That the former decree for a conveyance, &c. was not a bar to this suit. 2. That no allowance ought to be made for improvements, nor any charge allowed for the wood and timber cut from the land. 3. That the act of limitations was a bar to the rents and profits claimed for the three years next preceding the filing the bill.

1814.

West  
vs.  
Jarrett

but the defendants, or either of them, have never accounted with him for any part of the profits thereof. Prayer, that the defendants may account for the timber and wood cut by them, and for the rents and profits, and for further relief, &c. The defendants, in their answer, stated that they had made considerable improvements on the land more than sufficient to cover all the profits they received from it. They pleaded and relied on the act of limitations as a bar to an account. Commissions were issued and testimony taken.

KILTY, Chancellor, (February term 1810.) The testimony taken under the commission is such as to render it difficult to form a correct opinion as to the value of the improvements, and the relative value of the land before it was cleared, and at the time when *West* obtained possession of the land with the improvements. But on the several points made by the counsel, the chancellor has come to the following conclusion; 1. That the decree of the court of appeals, for a conveyance of the land by *Jarrett* to *West*, instead of vacating the patent as particularly prayed by the bill, is not a bar to the present suit, inasmuch as no account was prayed, and the decree does not necessarily imply that an account was improper, nor does it appear that the subject was in that *respect* considered and acted upon by the court. 2. That no allowance ought to be made for improvements, nor any charge allowed for the timber or wood cut from the land. 3. That the act of limitations pleaded and relied on in the answer, is a bar to the rents and profits claimed for the three years next preceding the filing of the bill. And as to the fraud alleged by the counsel for the complainant to prevent this plea from being a bar to so much, the chancellor does not perceive that any such fraud is alleged in the present bill, or that it is to be inferred from the proceedings in the former suit. The late chancellor stated as the grounds of his decree, that the then complainant, *West*, had not satisfied him that he had an equitable claim to land comprehended in the defendant's patent of *Contestable Manor*, and that when the defendant obtained his patent, he was apprised of the said equitable claim. For the reversal of this decree by the late court of appeals, no reason appears to have been given. 4. That the charges of

interest, as stated in the auditor's account, are made according to the established practice in such cases, which the chancellor does not see any cause for altering. 5. That considering the nature of the transaction, and the proof of the amount of the rents for former years, a presumption arises that the same amount was afterwards received, and it is on this presumption only that the sum to be allowed in this decree can be supported. Upon these principles the auditor has been directed to state another account, by which it appears that there is a balance due to the complainant on the 15th of November 1808, of £178 8 3. Decreed, that the defendants pay to the complainant the said sum of £178 8 3, with interest thereon from the 15th of November 1808, until paid. Costs not allowed. From this decree the complainant appealed to this court.

1814.

Prather  
vs  
Johnson

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, and EARLE, J.

*Shaaff* and *T. Buchanan*, for the Appellant, to show that the act of limitations was no bar to the claim for rents and profits, referred to *Pulteny vs. Warren*, 6 Ves. 73. *Dormer vs. Portescue* 3 Atk. 124; and *Schnertzell vs. Chaphne*, 3 Harr. & M'Hen. 439.

*Martin and Magruder*, for the Appellees, cited *Gill vs. Cole*, 1 Harr. & Johns. 403, and *Sugd.* 243.

DECREE AFFIRMED.

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PRATHER VS. JOHNSON, *et al.*

DECEMBER.

**ERROR to Prince-George's County Court.** This was an action of *assumpsit*, brought on the 3d of August 1796, for money laid out and expended. The defendant (now plaintiff in error,) pleaded *non assumpsit*, and *non assumpsit in fra tres annos*.

1. At the trial the plaintiffs, (the defendants in error,) proved that *Thomas Williams*, deceased, was collector of

Where the sureties of W deceased, late a collector of public taxes, were compelled, as such, to pay the amount due from the collector to the state, and for their reimbursement, an act of assembly authorized them to bring suits against persons owing taxes, in the same manner as W might—

*Held*, that as W could have brought suits and recovered on proof of the taxes being due, and that they were paid by him to the state, the sureties could do the same; and that it was of no consequence whether the sureties all together paid, or only one of them paid, or the collector had paid, for by substitution they stood in the place of the collector.

If A, as surety of B, pays a debt due to C, on proof of the payment, A could recover of B, and an oral or written acknowledgment by C, of the payment, would be evidence in the suit against B.

When an act of assembly directs that the certificate of a public officer shall be evidence, a paper produced with his name will be evidence *prima facie* unless the name is proved not to have been signed by him, as where a paper, purporting to be an account made out by T H, as treasurer of the W, and signed by him, and by him sworn to before a justice of the peace, with a certificate of the clerk of the county that such person was a justice, &c. was permitted to be read in evidence, under the act of 1793, ch. 102.

1814.

Prather  
vs  
Johnson

the public taxes for *Prince-George's* county for the years 1780, 1781 and 1782; and that the defendant was indebted for taxes and public dues for the years 1781 and 1782, the different sums of money stated to be due from him in the account exhibited. They then read in evidence the two acts of assembly of 1784, *ch.* 43, and 1785, *ch.* 33, authorising and empowering the securities of *Thomas Williams*, deceased, late collector of the tax and public dues in *Prince-George's* county, to complete the same. They also proved that they were the persons mentioned in the said acts of assembly as the securities of the said *Williams* with *R. Smith*, in said acts also mentioned, who was since dead. They then offered to prove that the said taxes and public dues, for the years 1781 and 1782, for which the defendant was indebted, together with all the taxes and public dues for the years 1780, 1781 and 1782, for *Prince George's* county, were paid into the treasury by the said securities of *Thomas Williams*; and they read to the jury a paper purporting to be an account made out by *Thomas Harwood*, as treasurer of the *Western* shore, and signed by him, and by him sworn to before a justice of the peace for *Anne-Arundel* county, on the 12th of September 1799, with a certificate of the clerk of that county court, that the person who took the affidavit, was a justice of the peace, &c. The defendant then offered to prove, that *John Waring*, one of the plaintiffs, together with the said *R. Smith*, were securities for the said *Williams*, for the collection of the taxes and public dues of the year 1780; that *J. S. Brookes* and *T. Harwood*, two other of the plaintiffs, were securities for the said *Williams* for the collection of the taxes and public dues of the year 1781, and that *R. Johnson* and *E. Berry* were the securities for the said *Williams* for the year 1782, and that they did respectively execute for that purpose the several bonds produced, together with the said *Williams*, as they respectively purport to have been executed. He then offered to prove, that *J. Waring*, one of the plaintiffs, had not paid any money, or other thing, to the state, or to any person authorised to receive it, for or on account of any taxes or public dues for the years 1781 and 1782, for which the defendant was liable, or on account of any other taxes or public dues in those years, nor had any person for the said *Waring*, or at his request, made such payment. He then prayed

the direction of the court to the jury, that if the jury should be of opinion, from the evidence, that *J. Waring*, one of the plaintiffs, had not paid any sum to the state for or on account of any taxes or public dues for the years 1781 and 1782, for which the defendant was liable, or for any other taxes or public dues for those years, and if no other person had made such payment for the said *Waring*, or at his request, that then the plaintiffs were not entitled to recover. But the Court, [*Stone*, Ch. J.] refused to give the direction. The defendant excepted.

2. The defendant then objected to the paper herein before mentioned, purporting to be an account made out by *T. Harwood*, as treasurer of the western shore, being read in evidence. But the court overruled the objection, and permitted the paper to be read in evidence. The defendant excepted; and the verdict and judgment being against him, he prosecuted the present writ of error.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE and JOHNSON, J.

*Shaaff*, for the Plaintiff in error, contended, 1. That a joint *assumpsit* to the plaintiffs below was laid in the declaration, and that there was proof that there could be no *assumpsit* to *J. Waring*, as he paid no money, and therefore he could not sue. He referred to *Ott vs. Chapline*, 3 *Harr. & M'Hen.* 323, and *Goldsmith's Adm'r. vs. Pattison's Ex'r.* 1 *Harr. & Johns.* 205.

2. That the account stated by the treasurer to be copied from the treasury books, was not evidence, because there was no proof that *T. Harwood* was the treasurer, nor was his signature to the account proved. That the probat to the account, that it was truly copied from the books of the treasury office, was not according to the act of 1798, *ch.* 108, that act requiring that the account should be attested by the treasurer, and sworn to be a true copy by the person attesting it, and there was no proof that he did attest it. It also says, that the account proved according to that act shall be evidence in the same manner, and to have the same effect, as if the original books, &c. were themselves produced, and in this case if the books had been produced, they would not of themselves have been evidence.

No Counsel argued for the Defendants in error.

1814.

Prathner  
vs  
Johnson

1814.

Scholls  
vs  
Shriner

JOHNSON, J. The sureties of *Williams* were compelled as such, to pay the money due from him to the state, and for their reimbursement the acts of assembly authorised them to bring such suits as *Williams* might—now *Williams* could have brought a suit, and recovered on the proof of the taxes having been due, and that they were paid by him to the state. The securities then can do the same; and it is of no moment whether they all together paid, or one of them paid, or the collector paid, for by substitution they stood in his place.

If A as surety for B, pays a debt due to C, on the proof of the payment, A could recover of B. He could recover on C's saying A had paid, and of course if C wrote that A had paid, surely it is evidence whether the writing was in a book or a letter.

When an act of assembly directs the certificate of a public officer to be evidence, a paper produced with his name will be evidence *prima facie*, unless the name is proved not to have been signed by him.

JUDGMENT AFFIRMED.

DECEMBER.

SCHOLLS, *et al.* vs. SHRINER.

If the pleadings in a record transmitted to the court of appeals by writ of error, are entered short, the judgment must be reversed

ERROR to *Montgomery County Court*, on a judgment in an action of replevin, for the plaintiff, (now defendant in error.) The pleas, avowry and replications, were all stated short in the record. The verdict and judgment being for the plaintiff, the defendants brought a writ of error to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J.

*Shauff*, for the Plaintiff in error. This court has decided, that where the pleadings were not set out at length in the record, the judgment of the court below cannot be sustained.

No Counsel appeared for the Defendant in error.

JUDGMENT REVERSED

SPRIGG vs. NEGRO MARY.

1814.

DECEMBER.

APPEAL from *Frederick County Court*. The present was a petition for freedom. Plea, the general issue.

Sprigg  
vs  
Negro Mary

1. At the trial the petitioner, (now appellee,) gave in evidence, that she was the slave of *T. Sprigg*, of *Frederick* county, in this state. That *Sprigg*, during all his life, was a citizen of this state, and died in the state in July 1810. That *Esther*, the mother of the petitioner, was born in the state the slave of *Sprigg*, and was held by him in slavery in the state until 1804, in the fall of which year he suffered her to be carried to *Washington* county, in the District of *Columbia*, by one *C. Herstons*, and that she continued there, employed by and residing with *Herstons*, for two years, when she was sent back to *Frederick* county by *Herstons* to *Sprigg*, and continued to reside and be employed in *Frederick* county by *Sprigg* until his death. That *Esther* never was hired or otherwise employed in the District of *Columbia*, until the year 1804. That *Mary*, the petitioner, was the child of *Esther*, and was born in the District of *Columbia*, while her mother was there as is herein before stated, and returned with her mother, and continued with her ever since in *Frederick* county. On these facts the defendant prayed the opinion of the court to the jury, that the petitioner was not entitled to her freedom. The Court [*Shriver* and *Nelson*, A. J.] refused to give this opinion; but were of opinion, that if the jury found the said facts to be true, the petitioner was entitled to her freedom. The defendant excepted.

2. The petitioner then produced a mulatto man named *R. Shorter* as a witness, whose mother was a black woman. To the swearing of this witness, the defendant objected. It was then proved to the court by the evidence of *R. Brooke*, esquire, (an attorney of the court,) that *Shorter* was sworn as a witness in *Frederick* county court, in a cause of *Nelly Shorter* against *Jason Phillips*, a white christian man.<sup>1</sup> The record of that cause was also produced, by which it appeared that *Shorter* was sworn in the said cause on the part of the said *N. Shorter*. *Brooke* also proved, that the mother of *R. Shorter* was a black woman, but that she was free, having been one of the *Shorter* family who had claimed their freedom, and obtained it, on the ground of their being descended from a white woman.

Where the mother of a petitioner for freedom was born in this state the slave of T S, and was held by him in slavery until 1804, when he suffered her to be carried to the county of *Washington*, in the District of *Columbia*, by C H, where she continued employed by, and residing with C H, for two years, when she was sent back to this state to T S. The petitioner was born in the county of *Washington*, in the District of *Columbia*, while her mother was there, and brought with her mother into this state, and has continued here—Held that the petitioner was entitled to freedom

A free mulatto man, whose mother was a free black woman, but descended in the female line from a white woman, was permitted to give evidence, in the case of a negro petitioning for his freedom, against a free white christian

A negro slave belonging to an infant under the age of 16, and brought into this state subsequent to the act of 1793, ch 67, by the father and natural guardian of such infant, is not entitled to freedom

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Sprigg  
vs  
Negro Mary

He also proved, that *R. Shorter* was at liberty and free, and that it was generally reputed that he was descended from the said *Shorter* family, and from a free white ancestor on the female side. The petitioner also produced to the court a certificate given by the clerk of *Frederick* county court to the said *R. Shorter*, certifying that he had recovered his freedom, in that court, of *T. Sprigg*. She also produced the docket entries of that court, showing that a petition for freedom was filed by *R. Shorter* against *T. Sprigg*, and that on the trial thereof, a verdict that he was free, was given for the petitioner, on which a judgment was entered on the 2d of December 1795. The original petition of the said *R. Shorter* was then searched for by the clerk of the court, but could not be found, being either lost or mislaid, and no record made of it. The defendant still objected to the competency, as a witness, of *R. Shorter*. The defendant was a free white christian man. But the court overruled the objection, and *R. Shorter* was examined as a witness. The defendant excepted.

3. The defendant then offered in evidence, that in the year 1804, and before the mother of the petitioner was carried to the district of *Columbia*, *T. Sprigg* came to the house of *C. Herstons* in *Frederick* town, and said to him, I have given *Esther*, and her children, to *M. Herstons*, who was then an infant of about five years of age. That *Esther*, and her children, were then at the house of the said *C. Herstons*, the father and natural guardian of the said *M. Herstons*, and were then left in his possession by the said *Sprigg* as the property of *M. Herstons*. That *C. Herstons* held and possessed the said negro woman, and her children, for *M. Herstons*, as her guardian, from the time of the said gift, and as her guardian carried the said *Esther*, and her children, to *George* town, in the district of *Columbia*, and continued to hold her there for *M. Herstons*, for about two years, when he returned her, and her child, the petitioner, to the said *Sprigg*, in *Frederick* county in this state, where *Esther* and her child have continued ever since. That the petitioner was born after the aforesaid gift, and while her mother was so possessed for *M. Herstons*. That *M. Herstons* is still an infant under the age of 16 years. The petitioner then prayed the court to direct the jury, that if they were of opinion from the evidence, that the petitioner was born out of this state, and

brought into the state subsequent to the passage of the act of 1796, *ch.* 67, that she was entitled to her freedom, even if they found the facts last above stated to be true. This opinion and direction the Court, [Nelson, A. J.] gave to the jury. The defendant excepted; and the verdict and judgment being for the petitioner, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, EARLE, and JOHNSON, J.

*Shaaff*, for the Appellant, referred to the acts of 1802, *ch.* 68; 1813, *ch.* 56; and 1796, *ch.* 67, s. 7; and *De Kerpelgand vs. Negro Hector*, 3 *Harr. & M'Hen.* 185.

*Magruder*, for the Appellee.

THE COURT concurred in the opinions of the County Court in the *first* and *second* bills of exceptions, but dissented from that in the *third* bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## SPRIGG VS. NEGRO PRESLY.

DECEMBER.

APPEAL from Frederick County Court from a judgment on a petition for freedom. The general issue was pleaded.

1. At the trial the petitioner, (now appellee,) offered in evidence, that he was the child of a mulatto woman named *Esther*, who was the slave of *T. Sprigg* of Frederick county, who during all his life-time was a citizen of this state, where *Esther* was born his slave, and continued to be held by him in slavery until 1804, when the said *Sprigg* suffered her and her child, the petitioner, to be carried to the county of *Washington*, in the district of *Columbia*, by one *C. Herstons*, and that she and the petitioner continued there, employed by and residing with *Herstons* for two years, when they were sent back to *Frederick* county by *Herstons*, to the said *Sprigg*, with whom they continued to reside, and to be employed by him until his death in

1814.

*Sprigg*  
vs  
*Negro Presly*

A petitioner for freedom, being the slave of T S of this state, was, when about three years of age, carried with the permission of T S to the county of *Washington*, in the district of *Columbia*, by C H in 1804, where he continued employed by, and residing with C H, for two years, when he was sent back to this state to T S, with whom he continued to reside and to be employed until the death of T S in 1810—*Held*, that the petitioner was entitled to freedom.

E H deposed, that she hired *Esther*, the mother of the petitioner for freedom from T S in 1810 for one

year, who informed her he intended *Esther* for M H, and after the death of T S she paid the wages to C H, who brought an order from the defendant, which order was expressed to be for the use of M H. That at the time of E H hiring *Esther*, on her advising T S to hire *Esther* to her husband, who was a free man, he objected, and said he had no thought of hiring her to any body, but he would talk with Mrs. S, and if on consulting her she thought it advisable, the witness might have *Esther*, and a few days after the defendant informed her she could have *Esther* for \$24 per year—*Held*, that the testimony of E H was admissible.

If a negro slave was in possession of C H, and whilst so T S, the master of the slave, verbally gives the slave to M H, the daughter of C H, then an infant of four years old, and left the slave in the possession of C H, for the use of M H, and C H kept possession of the slave for the benefit of M H, then such verbal gift is sufficient to transfer the property in the slave to M H, without any other delivery.

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~  
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 v.  
 Negro Presly

1810. That when the petitioner was carried to the district of *Columbia* he was about three years old. The defendant then prayed the court to direct the jury, that if they found these facts to be true, they were not sufficient to entitle the petitioner to his freedom. The Court, [*Shriver and Nelson, A. J.*] refused to give this direction; but were of opinion, and so directed the jury, that if they found the facts to be true, the petitioner was entitled to his freedom. The defendant excepted.

2. The petitioner then offered to read in evidence the deposition of *Mrs. E. Hall*, (admitted by the parties to be read in evidence so far as it contains matters that can properly be offered in evidence.) who deposed, that she hired *Esther* from *T. Sprigg* in 1810, and that she was with her about one year. That after the death of *T. Sprigg* she paid the wages due for said hire to *C. Herstons*, who brought an order from the defendant, (which order was expressed to be for the use of *M. Herstons*.) That *T. Sprigg* told the deponent, about the time aforesaid, that he intended *Esther* for *M. Herstons*, and on her advising him to hire her to her husband, who was a free man, *Sprigg* said no, he would not, for that she was good for nothing enough already, and if he hired her to her husband she would make all her family as worthless as herself. He further observed, that he had no thought of hiring her to any body, but he would talk with *Mrs. Sprigg*, and if on consulting her she thought it advisable, the deponent might have *Esther*; and that a few days after the defendant came up and let the deponent know she could have *Esther* for \$24 per year. The defendant then objected to the reading of this deposition. But the court were of opinion that the same was legally admissible in evidence, and permitted it to be read to the jury. The defendant excepted.

3. The defendant then offered in evidence, by the testimony of *C. Herstons*, a competent witness, that *Esther*, the mother of the petitioner, was sent by her master *T. Sprigg* to the house of the witness, a few days after the witness had married the daughter of the said *Sprigg* in 1797. That *Esther* continued with the witness until the death of his wife in 1803, before which time the petitioner was born, being now about 13 or 14 years old. A few days after the death of the wife of the witness, the said *Sprigg* came to the house of the witness in *Frederick town*,

in *Frederick* county, and said to him, I have given *Esther* and her children, (of whom the petitioner was one,) to *M. Herstons*, she being then an infant about four years old, and was then at the house of the said *Sprigg* in *Frederick* county, about 7 miles from *Frederick* town, and continued with him until 1807, when she went to reside with her father, the witness, in *George* town. At the time of this declaration of *Sprigg* to the witness, *Esther* and her children, of whom the petitioner was one, were at the house of the witness, the father and guardian by nature of *M. Herstons*, and were then and there left in his possession by the said *Sprigg*, and from thenceforth were held by the witness as the property of *M. Herstons*, and for her. That the witness held and possessed in *Frederick* town, the said *Esther* and her children, of whom the petitioner was one, for *M. Herstons*, and as her natural guardian, from the time of the said declaration of the said *Sprigg* to him, until he removed to *George* town, in the district of *Columbia*, in 1804. When he so removed he carried *Esther*, and her children, of whom the petitioner was one, with him, and held and possessed them in *George* town aforesaid, as the natural guardian of *M. Herstons*, and for her, until 1807, when finding *Esther* troublesome and disagreeable to him, he sent her and her children, of whom the petitioner was one, to the said *Sprigg* in *Frederick* county. That *Sprigg* kept her and her children at his house until 1810, when he hired her out, and the witness in 1811, after the death of *Sprigg*, received her hire for the use of *M. Herstons*. The petitioner then offered in evidence the inventory taken in July 1810, of the personal estate of *Sprigg*, and which includes the petitioner. The defendant then offered in evidence, by the said *Herstons*, that he was in *New York* at the time of the death of the said *Sprigg*, and when the said inventory was returned. He came to this state before the day appointed for the sale of the personal estate of the said *Sprigg*, and on making known to the administrator that the petitioner was so given to *M. Herstons*, the petitioner was not sold with the property of the deceased. That *M. Herstons* is the daughter of the witness, and the granddaughter of the said *Sprigg*. The defendant then prayed the opinion of the court to the jury, that if they found from the evidence that the petitioner was in possession of *C. Herstons*, and that whilst he was

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vs  
*Negro Paddy*

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vs  
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so in possession, *T. Sprigg*, the master of the petitioner, verbally (as proved by *Herstons*,) gave the petitioner to *M. Herstons*, the daughter of *C. Herstons*, then an infant of four years old, and then left the petitioner in the possession of *C. Herstons*, for the use of *M. Herstons*, and that *C. Herstons* kept possession of the petitioner for the benefit of *M. Herstons*, that then the said verbal gift was sufficient to transfer the property in the petitioner to *M. Herstons*, without any other delivery. This opinion the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, EARLE, and JOHNSON, J. by

*Shuaff*, for the Appellant; and by  
*Magruder*, for the Appellee.

THE COURT concurred with the County Court in the opinions in the *first* and *second* bills of exceptions, but dissented from that in the *third* bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DECEMBER. FORD, Terretenant of PRESTON, vs. GWINN's Adm'r.

J G obtained a judgment against B P, on which a *scire facias* was issued against his terre-tenant, who pleaded—1. That B P was not seized of the land of which he was returned tenant. 2. That before the *scire facias* was issued a *ca sa* had issued against B P, who was taken in execution, and committed to R A the sheriff, that B P escaped, and suits were brought by J G on R A's bond as sheriff, for the escape, and judgments obtained against R A, and his sureties. A demurrer to the last plea was ruled good.

APPEAL from *Harford* County Court. This was a writ of *scire facias* sued out on a judgment rendered in that court in August 1797, in favour of the appellee's intestate against *Preston*. The defendant, (now appellant,) pleaded two pleas—1. That *Preston* was not seized of the lands of which he the defendant was returned tenant, &c. 2. That the plaintiff ought not to have execution of the lands, &c. because before suing out the *scire facias* a *ca. sa.* issued against *Preston*, who was arrested and brought into court, and committed to the custody of *Robert Amos*, junior, the then sheriff. That *Preston* escaped from the custody of the said sheriff. That the said *Gwinn* brought suits on the said *Amos's* bond as sheriff, for the said escape. That in March 1800, a judgment

To show that B P was in 1797, at the time when a judgment was rendered against him, seized of the land of which J F was, on a *scire facias* issued on the judgment, returned tenant, evidence was given of a devise of the land to B P in 1763, by his father J P, who had been in possession a considerable time before his death; a conveyance by B P to J L in May 1793; a conveyance by J L to J H in June 1799; and a conveyance from J H to J F, the terretenant, in 1801—*Held*, that such evidence was not sufficient to prove a seisin in B P in the land in question, at the time the judgment was obtained against him.

was rendered on the said bond against *Amos*, and his securities, for damages and costs sustained by reason of the said escape, &c. Issue was joined to the first plea, and a general demurrer, and joinder in demurrer, to the second. The county court gave judgment on the demurrer for the plaintiff.

In the trial of the issue in fact, the plaintiff read in evidence the will of *James Preston*, dated the 17th of September 1766, devising to his son, *James Preston's* son *Benjamin*, a tract of land called *Plumb Point*, and part of *Hog Neck*, and *Robinson's Chance*, &c. to him, his heirs and assigns, for ever. Also a deed from *Benjamin Preston* to *Josiah Lee*, dated the 17th of May 1799, for the lands called part of *Hog Neck*, part of *Plumb Point*, and part of *Mate's Addition*. Also a deed from *Josiah Lee* to *James Lytle*, dated the 19th June 1799, for the said lands. Also a deed from *James Lytle* to *Joseph Ford*, dated the 18th August 1801, for the said lands. And also gave evidence, that the lands by the will aforesaid devised to *Benjamin Preston*, were by him sold to said *Lee*, and that the same lands were purchased by the said *Ford* from the said *Lytle*. That the said lands were in possession of *James Preston*, the devisor, a considerable time before his death, and are the same of which the defendant was returned terretenant; and that *Benjamin Preston*, the devisee, was the person against whom the original judgment was obtained. The defendant then objected to this proof as insufficient in law to support the issue on the part of the plaintiff, and prayed the court so to direct the jury. But the Court, [*Nicholson*, Ch. J.] was of opinion, and so directed the jury, that the proof was evidence of the seisin of *Benjamin Preston*, unless the defendant showed that he held the lands in question under some other title; that after the plaintiff had shown that the defendant derived his title from *Preston*, the court would not compel the plaintiff to show *Preston's* title, which the defendant was estopped from questioning, unless he the defendant could show that he held by some other title. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, and JOHNSON, J.

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*Hall*, for the Appellant, referred to *Saunders*, *terrt. of Duley vs. Webster*, (*ante* 432.)

*Montgomery*, (Attorney General,) for the Appellee, insisted that *Saunders vs. Webster* was distinguishable from the present case. That the judgment of the court below ought to be affirmed, although this court should differ from the court below in the reasons on which the judgment was formed; and although the court below determined that the plaintiff ought to recover, because the defendant was estopped from controverting the title of the person against whom the judgment was rendered, inasmuch as he appeared to claim under him; yet if there existed sufficient evidence to presume a grant, then there was no need to resort to the doctrine of *estoppel*, inasmuch as the seisin would then be proved. There was presented to the court a case of possession for more than 44 years apparent title, derived through a will and several deeds, a contest arising between the persons, all claiming under the same title, in which it is now contended that one of them, in a contest about the land, must produce the grant for the land to the person under whom all the parties claim. It would seem that the grant ought to be presumed, and this court gave such a decision in *Bradford's Lessee vs. M<sup>c</sup>Comas*, (*ante* 444,) which cannot be distinguished from the present case, where the parties claim under *J. Preston*, and the seisin in him ought to be presumed; but as that cannot exist without the grant, it should be presumed the time is longer, the conveyances more numerous, and the relative situation of the parties the same.

THE COURT affirmed the judgment of the County Court on the demurrer (*a*), but dissented from the opinion of that as expressed in the bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

(*a*) See *Freeman vs. Ruston*, 4 *Dall. Rep.* 214.

BRUCE'S Adm'rs. vs. SMITH. 1814.

DECEMBER.

APPEAL from *Allegany* County Court. This was an action of trespass *vi et armis*, against the appellant's intestate, for seizing and taking certain negro slaves, the property of the plaintiff, (now appellee,) and converting them, &c. Plea, the general issue.

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vs  
Smith

1. On the trial the plaintiff produced to the court and jury a certified copy of a bill of sale, from *Charles F. Brodhag* to him the plaintiff, both of *George-Town*, in the county of *Washington*, and district of *Columbia*, dated the 26th of December 1804, for sundry negro slaves, to secure the payment of \$3100, with interest, on or before the 26th of December 1805, due to *C. C. Jones*, and if not paid at that time, the said *Smith* to make sale of the said negro slaves, &c. The bill of sale was acknowledged the 26th of December 1804, before two justices of the peace of the said county of *Washington*, and recorded in the records of that county on the 10th of January 1805, and certified under seal by the clerk of the circuit court of the district of *Columbia* for said county, to be truly taken from the land records for said county; also certified by the chief judge of the circuit court of said district, that the attestation by the clerk, &c. was in due form; and also certified, under seal, by the clerk aforesaid, that the chief judge, who certified as aforesaid, was duly commissioned and qualified. To the reading of this bill of sale to the jury, the defendant objected. But the Court, [*Buehanan*, Ch. J.] was of opinion that the same was legal evidence, and permitted it to be read as such. The defendant excepted.

2. The plaintiff then offered evidence to prove, that the defendant, as sheriff of *Allegany* county, on the 7th of August 1809, seized and sold the goods and chattels mentioned in the plaintiff's declaration; and that the goods and

A bill of sale executed by C B to C S, both of *Washington* county, in the district of *Columbia*, on the 26th of December 1804, for sundry slaves, to secure the payment of a debt due to C J, and acknowledged on the same day before two justices of the peace of that county, and recorded on the 10th of January 1805 in the records of said county.—Held, that a copy thereof, certified under the seal of the court by the clerk of the circuit court of the said district for said county, with the certificate of the chief judge of said court, that the attestation was in due form; and also a certificate by said clerk, under the seal of the court, that the said chief judge was duly commissioned and qualified, was legal evidence.

C B executed a bill of sale of sundry slaves to C S, to secure the payment of a debt bona fide due, C B and C S being both at that time residing in the county of *Washington*, in the district of *Columbia*, which bill of sale was duly executed, acknowledged and recorded, agreeably to the laws of that part of the district, and which were the same as the laws of this state. C B after-

wards removed into this state, bringing with him the slaves, which had remained in his possession, and over which he exercised acts of ownership, paid the county assessment thereon, and sold some of them. C B, before and after his bill of sale to C S, was indebted to F D of the said county and district, who recovered a judgment against C B, in *Allegany* county court in this state, to which county C B had removed with the said slaves. Upon this judgment a writ of *fiat facias* issued, and the said slaves were taken and sold by the sheriff, against whom C S brought an action of trespass *vi et armis*, &c.—Held, that C S was entitled to recover, there being no proof to impeach the validity of the bill of sale, or to impeach the transaction with fraud, nor that the property transferred was more than sufficient to pay the debt intended to be secured.

It is the right of a debtor to give preference to one of his creditors by a fair and honest transfer of his goods adequate to the payment of his debt.

The retaining, by the grantor, possession of property included in a bill of sale duly executed, acknowledged and recorded, is sanctioned by the act of 1729, ch. 8.

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chattels, so seized and sold, were the same mentioned in the aforesaid bill of sale. The defendant then offered in evidence the record of a judgment obtained in *Allegany* county court, by *Leonard M. Deakins* and *John Hoyer*, executors of *Francis Deakins*, against *Charles F. Brodhag*, at April term 1809, for \$1000 current money, damages and costs, to be released on payment of \$658 86, with interest thereon from the 13th of February 1805. Also the execution issued on the said judgment on the 7th August 1809, and directed to the sheriff of *Allegany* county, returnable on the second Monday of October then next, and returned "made and satisfied plaintiff. *W. Bruce Shiff*." The defendant then proved, that the said execution came to his hands as sheriff, and that by virtue thereof he seized and took the goods and chattels, for the taking of which the suit was brought. The defendant also offered evidence to prove, that *Charles F. Brodhag* in 1804, and until they were taken by the defendant, was in possession of the said goods and chattels. That *Brodhag* was assessed and charged on the books of the commissioners of the tax for *Allegany* county for 1804, 1806, 1807, 1808, 1809 and 1810, for the same. The defendant also offered evidence to prove, that in the spring of 1805 *Brodhag* removed from *George Town*, in the district of *Columbia*, to *Allegany* county, when he brought with him the said goods and chattels, and that the said *Brodhag* from that time, to the taking thereof by the defendant, was in possession thereof. The defendant also offered evidence to prove, that before and after the 26th of December 1804, *Brodhag* was indebted to *Leonard M. Deakins* and *John Hoyer*, executors of *Francis Deakins*, who resided in the county of *Washington*, and district of *Columbia*, and that *Brodhag* was in possession of one of the negroes mentioned in the said bill of sale, until sometime in March 1813, at which time he died; that *Brodhag* was also in possession of another of the said negroes until sometime in April 1812, when he sold the same. Upon these facts the defendant prayed the direction of the court to the jury, that if they found from the evidence that *Charles F. Brodhag* was indebted to *Leonard M. Deakins* and *John Hoyer*, executors of *Francis Deakins*, before and after the execution of the said bill of sale to the plaintiff, on the 26th of December 1804, and that *Brodhag* held the possession of the property mentioned in said bill of sale

from the date thereof until the execution of the writ of *fiat facias* by the defendant, that then the plaintiff was not entitled to recover. This direction the court refused to give. The defendant excepted.

3. The defendant then prayed the opinion of the court to the jury, that if from the evidence they found that *Charles F. Brodhag* was in possession of the goods and chattels claimed by the plaintiff at the time of the execution of the deed to the plaintiff on the 26th of December 1804, and that *Charles F. Brodhag* continued in possession thereof until the 7th of August 1809, when they were seized and taken by the defendant, under and by virtue of the judgment and execution aforesaid, and that the plaintiff never was in possession thereof, that the plaintiff was not entitled to recover. This direction the court also refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court; and having died pending the appeal, his death was suggested, and his administrators were made parties.

The cause was argued before CHASE, Ch. J. and EARLE, and JOHNSON, J.

*Magruder*, for the Appellants. From the facts stated in the bills of exceptions, it appears that the plaintiff in the court below claimed the negroes under a deed executed to him by *Brodhag* in 1804, by which he was authorised to make sale of the negroes on the 26th December 1805, for the payment of a debt due to a third person, if not paid by that day; that the plaintiff permitted *Brodhag* to remain in the peaceable possession of the negroes, to exercise every act of ownership over them, and to use them as his absolute property, to remove them into this state, and to make sale of them, and made no claim to them until the institution of this suit in 1811, (almost six years after he was directed to sell, when they had been seized as the property of *Brodhag* to satisfy a judgment due to *Deakins's* administrators. The plaintiff claims under a deed acknowledged and recorded in the district of *Columbia*. *Brodhag* at the time was indebted to *Deakins*. This sale was void against creditors at the time by act of 1729, ch. 8, sect. 5. *Brodhag* was permitted to hold and exercise every act of ownership over the property, nearly five years after the plaintiff was authorised, and it was his duty to sell the property, if the

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debt was not paid. This of itself was evidence, that the debt was paid on the bill of sale originally executed to protect the property against creditors. If the deed was not executed with a fraudulent intent, and the debt thereby intended to be secured was not satisfied on the day mentioned in the deed, the possession of *Brodhag* afterwards was inconsistent with the deed. *Hamilton vs. Russell*, 1 *Crunch*, 516. *Edwards vs. Harben*, 2 T. R. 587; in which it is determined, that all such deeds, if the possession does not accompany and follow the deed, the deed is fraudulent and void as to creditors. In these cases, it is true the deed purported to be an absolute transfer, whereas *Brodhag's* deed was conditional. But this became absolute upon the arrival of the day of payment. To suffer *Brodhag* afterwards to keep possession, exercise every act of ownership over the property, and in every respect to use it as his own, would be sufficient to make the deed fraudulent and void as to creditors. In *Edwards vs. Harben*, Judge *Buller* takes the distinction between deeds to take place immediately, and to take place at a future time. In the latter case "the possession continuing with the vendor, till such future time, or the performance of the condition, is consistent with the deed." If a deed, executed and recorded in the district of *Columbia*, could be received in evidence in a case like this, then the object of our act of assembly, to prevent secret sales, would be defeated. If such a deed could be used after suffering the grantor to keep the possession of the property in this state four or five years as his own absolutely, no creditor could be secure. Fraud may be committed with impunity, if a conditional deed will authorise the party making it to hold the property for any length of time. In order to secure his property, and protect it against creditors, a man in debt has nothing to do but to convey it to some person whom he might style a creditor, (for there is no proof, except the deed, of any money being due to *Jones*;) and who might, as in this case, refuse to sell for payment of the debt, and refuse to let the claims of other creditors be paid out of the property. It is contended, that the deed executed in the district of *Columbia*, could not be used, and ought not to have been admitted in evidence to establish the plaintiff's right to this property, and after the long possession of the property by *Bradhag*, the plaintiff could not recover.

No Counsel argued for the Appellee.

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CHASE, Ch. J. delivered the opinion of the court. The court concur in the opinion given by the court below in the *first* bill of exceptions.

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The State

The bill of sale has all the solemnities prescribed and required by the act of assembly of 1729, *ch. 8*, to give it validity and operation in the case in which goods and chattels are intended to be transferred, and the possession is retained by the grantor. The copy offered is legal and competent evidence of the bill of sale, the laws of this state having been adopted in that part of the district of *Columbia* ceded by this state, and comprehended within the county of *Washington*.

The court concur in the opinions expressed by the court below in the *second* and *third* bills of exceptions; there being no facts stated to impeach the validity of the bill of sale, or contaminate the transaction with fraud. The circumstances that the grantor was indebted to *Francis Deakins* at the time of the obtaining the bill of sale, and the retention of the possession by the grantor, of the negroes for which the action was instituted, cannot taint the transaction with fraud or collusion to defeat a creditor of his just claim by covering the property by the bill of sale. It is the right of a debtor to give preference to one of his creditors by a fair and honest transfer of goods and chattels, adequate to the payment of his debt; and there are no facts stated to prove that the property transferred was more than sufficient to pay the debt intended to be secured, nor is there proof of any collusion between the grantor and grantee to cover the property remaining, from the claims of the other creditors of the grantor, after the debt of *Jones* was satisfied. The retaining the possession by the grantor is sanctioned by the act of assembly, and the bill of sale cannot be invalidated or impeached by it.

JUDGMENT AFFIRMED.

HAMILTON VS. THE STATE USE OF JAMESON.

DECEMBER.

APPEAL from *Charles County Court*. Debt on the testamentary bond, given on the estate of *Marmaduke Semmes*,

In an action on an administration bond, the condition of which was not in the words of the form prescribed by the act of 1798, *ch. 101, sub ch. 2, s. 11, or sub ch. 14, s. 5*, the defendant pleaded the general performance, and to the replication, assigning for breach the nonpayment of an account which the person, for whose use the action was brought, had against the deceased, the defendant demurred generally—Demurrer overruled.

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vs  
WOOD

dated the 18th of August 1808, and conditioned, "that if the above bound *Francis P. Hamilton*, who intermarried with *Letitia H. Semmes*, appointed executrix of *Marmaduke Semmes*, late of *Charles* county, deceased, shall faithfully pay all just claims against the deceased, and damages which may be recovered against him as executor aforesaid, and also all legacies bequeathed by the will of the said testator, then," &c. General performance was pleaded. Replication, nonperformance.—Breach assigned, the nonpayment of an account of *Jameson*, for whose use this suit was brought, against the testator, for medicine and attendance, &c. General demurrer to the replication. Joinder in demurrer. The demurrer was overruled by the county court, and judgment entered for the plaintiff for the penalty and costs, to be released on payment of, &c. From this judgment the defendant appealed to this court, where the cause was argued before CHASE, Ch. J. and BUCHANAN, JOHNSON, and MARTIN, J. by

*Chapman*, for the Appellant, who stated that the only point for the court to decide was, whether or not the form of the bond entered into was according to the formula prescribed by the act of 1798, *ch. 101, sub ch. 3, s. 11*, or *sub ch. 14, s. 6*. He contended that it was not, and not being so, no action could be sustained thereon.

No Counsel appeared for the Appellee.

JUDGMENT AFFIRMED.

DECEMBER.

PYE vs. WOOD, *et ux.*

In an action on a replevin bond, executed on suing out a writ of replevin for negro slaves, which writ was non prossed, and the plaintiff here were kept out of the negroes from May 1804 to March 1805. The defendant in order to shew the declarations of the plaintiff, that the slaves were of the value of \$1000, offered to ask a witness the following question.

"Did you hear the plaintiff at any time in October 1802, say that they knew where the negroes were, that they had left their possession by their orders, and that they would make no steps to regain the possession of them, and that they did not wish, and would not allow them to return?"—*Held*, that the question was inadmissible, and should not be answered.

APPEAL from *Charles* County Court. Debt upon a replevin bond, entered into on the 1st of April 1804, by *Sally* and *Elizabeth Doncastle*, with the defendant (the appellant,) and another, as their sureties, to *Edmund Ridgate*, administratrix of *Thomas H. Ridgate*, who intermarried with *John Woods*, the plaintiffs, (the appellees.) General performance was pleaded. Replication, nonperformance, setting out the action of replevin brought

by the *Doncastles* against *Ridgate's* administratrix, and its being nonprossed, &c. At the trial the plaintiffs offered to prove by the record and proceedings produced, that the negroes, in the condition of the writing obligatory mentioned, were taken under the replevin, *Doncastle* against *Ridgate*, and kept out of the possession of the plaintiffs from May 1804 to March 1805. The defendant then offered a competent witness, who proved the value of the said negroes at and during the time aforesaid, and also proved their value in October 1809 to be equal to their value at the time aforesaid. And then, in order to show by the declarations of the plaintiffs, that the said negroes were of little or no value, offered to ask the witness the following questions: "Did you hear the plaintiffs at any time in October 1809, say that they knew where the negroes were, that they had left their possession by their orders, and that they would take no steps to regain the possession of them, and that they did not wish, and would not allow them to return?" To the answering of these questions by the witness, the plaintiffs objected. And the Court, [*Key and Clarke, A. J.*] decided the questions to be inadmissible, and refused to permit them to be answered. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the cause was argued before CHASE, Ch. J. and BUCHANAN, JOHNSON and MARTIN, J. by

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vs  
Terme & Jauffret

*Chapman*, for the Appellant.

No Counsel appeared for the Appellees.

JUDGMENT AFFIRMED

TAYLOR vs. TERME and JAUFFRET.

MAY

APPEAL from *Baltimore County Court*. *Assumpsit* on a promissory note. The general issue was pleaded; and at the trial the plaintiff, (now appellant,) gave in evidence the note, which was dated the 21st of December 1808, and drawn by *Jauffret*, one of the defendants below, for \$1950, payable 60 days after date to the plaintiff, or order. It was admitted that *Jauffret* was a *Frenchman*, carrying on trade and commerce in the city of *Baltimore*; and that be-

If a person derives a benefit from a trade in which another is engaged, by receiving a portion of the profits, he is liable as a partner, tho' he acts only in the character of an agent, and receives such profits as a compensation for his agency.

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ing in want of a clerk or book keeper who understood the *English* and *French* languages, he applied to the other defendant (*Terme*.) for that purpose; that *Terme* asked him \$800 a year as a salary for his services, which *Jauffret* declined giving, but promised to give him the one fourth part of the profits arising from his business, which *Terme* agreed to accept, and in pursuance of such agreement entered into the employment of *Jauffret* as a book keeper. And it was also admitted, that the promissory note in question was afterwards given by *Jauffret* to the plaintiff, for so much money advanced by him to *Jauffret* in the course of his said trade and dealing. The plaintiff also gave in evidence, that *Terme*, during the time of his being in the service of *Jauffret*, had no control or management of the business of *Jauffret*, other than as a clerk or book-keeper, and that the business was conducted and carried on in the name of *Jauffret* alone. And he then prayed the court to direct the jury, that he was entitled to recover. But the Court, [*Nicholson*, Ch. J.] was of opinion, that *Terme* could only be considered, from the evidence, as the hired servant of *Jauffret*, and refused to give the direction. The plaintiff excepted; and the verdict and judgment being against him he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

*Pinkney* and *Winder*, for the Appellant, contended, that where a person derives a benefit from the trade in which another is engaged, by receiving a portion of profits, he is liable as a partner, although he expressly stipulates that he is not to be liable. If he takes the profits, he must bear the loss. They referred to *Watson* on Part. 9, 10, 13, 19, 26, 124, 169, 201. *Waugh vs. Carver*, 2 H. Blk. 245. *Morse vs. Wilson*, 4 T. R. 354. *Hesketh vs. Blanchard*, 4 East, 147. *Ord on Usury*, 47. 1 Com. on Cont. 285, 286. *Grace vs. Smith*, 2 W. Blk. 999.

*Martin*, for the Appellees, admitted that the authorities cited established the principle relied upon by the appellant's counsel, but contended that those decisions, being since the revolution, were not binding on this court.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

STEUART, *et al.* Lessee vs. MASON.

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ERROR to *Allegany* County Court. This was an action of *Ejectment*, originally brought in the *general court*, for a tract of land called *White Oak Level*. The defendant, (now defendant in error,) took defence on warrant for a tract called *Pleasant Valley*. Plots were made, and issue joined.

1. The defendant at the trial in the *general court* at October term 1805, offered to read in evidence a paper, purporting to be the deposition of Col. *Thomas Cresap*, taken on the 29th of April 1783, by and before a certain *Evan Gwynn*, the deputy of *Henry Shryock*, then, and before and afterwards, sheriff of *Washington* county. And he proved to the court, that *Cresap* died after the taking of the deposition; and produced a warrant of the survey issued out of this court on the 11th of November 1782, in an action of ejectment then depending for *White Oak Level*, being the same land for which this suit is brought, between the lessee of *David*, *Horatio*, and *Archibald Rosa*, (who are also three of the lessors of the plaintiff in the present ejectment, and proved that *William Steuart*, the other lessor of the plaintiff, claims under them,) and *George Mason*, under whom the present defendant claims, in which action the defendant took defence for *Pleasant Valley*, the same tract for which defence is taken in this ejectment. The warrant was the same as is usually issued out of this court, directed to the sheriff and surveyor of the county, for resurveying the lands in dispute between the parties, and for examining witnesses, &c. [See 2 *Har. Ent.* 785.] That the action was entered *abated* by the death of the defendant, at May term 1793. The defendant also produced to the court the plots and explanations returned by the sheriff and surveyor, to whom the above mentioned warrant of resurvey was directed, with the endorsements thereon, showing that they were returned to this court on the 13th of May 1783. The explanations to the plots appear to be

Depositions taken under a warrant of resurvey issued in a former action of ejectment, and returned by the surveyor with the plots, &c., on the death of the witnesses, evidence against the parties to the suit, and all claiming under them.

The depositions, though dated a day after the date of the execution of the warrant, will, if returned with the plots, be considered *prima facie* as having been taken on the survey.

The sheriff on such warrant is authorized to take all depositions relating to the matter in dispute between the parties, and is not confined to the taking of such testimony only as relates to the bounds of the lands to be surveyed.

The time when a certificate of survey was returned to the land office, and the time of the payment of the caution money, are facts for the decision of the jury.

The proprietary instructions are evidence when applicable.

If the caution money is paid on the return of a certificate of survey, and a grant is subsequently obtained, it will relate to the date of the certificate, though the warrant, under which the survey was made, was irregularly obtained, provided no other person becomes interested between the date

of the warrant, and the return of the certificate.

The caution money may, under the rules of the land office, be paid by the application of a warrant for a different tract, as well as if paid in money.

The Proprietary could not be affected by any adverse possession of land before it had been granted. Evidence that the certificate of an elder survey was in the land office when a junior survey was made and an elder grant thereon obtained, is for the decision of the jury. If the elder certificate was not then in the office, the person claiming under the junior certificate, was a purchaser without notice, and having obtained the first grant, it cannot be defeated by permitting the junior grant to relate to the elder certificate, so as to overreach the title under the elder grant.

The court will decide whether certain parts of a statement of facts, made preparatory to a bill of exceptions being taken, which are objected to, are legal evidence to prove any particular fact, (*note*.)

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signed by the sheriff and surveyor on the 28th of April 1783. He also showed to the court the entry on the docket of this court, at May term 1783, in the said action, in which the said plots and explanations were returned, to-wit: "Warrant executed—Plots and depositions filed 13th of May 1783." He also showed that the deposition of *Cresap*, in the hand-writing of the deputy sheriff, is now on the files of this court, together with other depositions taken and returned with the plots in that action, and had so been on the files of this court, from the time of the return of said plots until the present time. The plaintiff then objected to the reading of *Cresap's* deposition by the defendant.

CHASE, Ch. J. The court are of opinion that the deposition is admissible as evidence, notwithstanding it bears date on the day next subsequent to the day when the explanations to the plots appear to have been signed; the deposition having been returned, with several others, by the surveyor, with the plots in the cause, and filed in the clerk's office; these circumstances affording *prima facie* evidence that the deposition was taken on the survey.

The court are also of opinion, that the several parts of the deposition, which are not *scored*, are legal and proper evidence.

The chief judge observed, that the plaintiff's attorney had objected, that the deposition relates to subjects not relative to the survey, and that the sheriff had no right to take many parts of the deposition; that a general power was not given by the warrant of resurvey to take all depositions, but only such as relate to the subject of the survey, as to prove bounds, &c. This is the first time such an objection has been made. The sheriff is not restricted in taking the depositions of witnesses. The warrant empowers him "to examine upon oath any witness or witnesses, that by either of the parties shall be produced, in relation to the claims and pretensions of said parties to the lands in dispute, or any other land adjacent thereto, which shall be thought necessary by them to be laid out for the better illustration of the matter,"—so that the sheriff is authorised to take any depositions that may relate to the dispute between the parties. The plaintiff excepted.

2. The defendant then read in evidence a warrant granted to *Thomas Bladen* for 2000 acres of land, bearing date

the 21st of October 1743, on which warrant was the following endorsement made by the clerk of the land office, viz: "October 27, 1743, received this warrant of his excellency *Thomas Bladen*, esquire, for 2000 acres—1000 acres whereof he would have located upon *Licking* creek, and the remaining part between the lowest old town and the mouth of *Savage* river, and *Evelt's* creek, and *Will's* creek, running into the aforesaid branch. February 20th 1744—1900 acres, part of this order, not being yet executed, it is this day renewed and continued in force for six months longer from this date. June 28, 1745—1329 acres, part of the within warrant being still unexecuted, it is this day again renewed for that quantity, and continued in force for six months longer from this date. December 27, 1745. The within order is continued in force for six months longer from this date. Executed 100 acres, part of the within warrant, for *Geo. Adam Wild*; 138 acres more," &c. the whole amounting to 2000 acres. Also a warrant granted to *George Steuart*, and by him assigned to *Bladen*, for 4012 acres of land, bearing date on the 5d of February 1746—which warrant was thus endorsed: "The above warrant being by the said *Steuart* assigned to his excellency *Thomas Bladen*, esquire, and 2000 acres thereof is applied to make good rights to a warrant for that quantity granted to the said *Bladen* the 21st of October 1743, and the remaining 2012 acres is applied to make good rights to so much part of a warrant for 3000 acres, granted unto the said *Bladen* the 16th of April 1745." Of this last mentioned warrant to *Steuart*, 2000 acres were applied to make good the rights of *Bladen* under his first mentioned warrant of the 21st of October 1743. The defendant further gave evidence, that in virtue of the said first mentioned warrant, the following certificates of survey were made for, and patents issued thereon, to *Bladen*, and his assigns, to wit: 100 acres called *Fright*, surveyed 11th May 1744, examined 15th May, 1745, and patented to *John Flemmin* the 29th September 1761; and 1561 acres, in separate tracts, to other persons at other periods, amounting in all to 1661 acres—Also a warrant granted to *Bladen* for 2000 acres of land, dated the 15th of April 1745—on which was the following endorsement: "248 acres assigned *Daniel Cresop*, and applied to *The Three Spring Bottom*—260 acres assigned *George Mason*, and applied to *Helchman's Conquest*—240 acres

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applied to *Content*—625 acres applied to *Cumberland*.” That in virtue of the last mentioned warrant the following certificates of survey were made out for, and patents issued to *Bladen*, and his assigns, to wit: 248 acres, called *Part of Three Spring Bottom*, surveyed in Nov. 1746, and examined and passed the 9th May 1761, and patented to *Daniel Cresap* on the 29th of September 1761; 240, called *Providence*, surveyed 11th Nov. 1746, examined 16th May 1761, and patented to *Thomas Bladen* the 29th September 1763; 625, called *Cumberland*, surveyed 29th April 1751, examined 16th May 1761, and patented to *Thomas Bladen* the 29th of October 1765; 240 acres, called *Content*, surveyed 30th April 1761, examined 16th May 1761, and patented to *Thomas Bladen*, the 29th of September 1763, making in the whole the quantity of 1353 acres. Also the certificate of a tract of land called *Cumberland*, surveyed for *Bladen* on the 29th of April 1751, for 625 acres, with the agent’s receipt, and the governor’s approbation that patent might issue, to show that a part of the land mentioned in that certificate was compounded for by the payment of money. The receipt stated that the sum of £15 19 0, for 312 acres, to make up the quantity wanting in the survey, and £15 10 5 for 12 years and 5 months rent of the land to Michm’s 1763, was received on the 1st of July 1763, and that patent might therefore issue with his excellency’s approbation, which was given. That in virtue of the last mentioned warrant to *Bladen*, dated the 15th of April 1745, for 2000 acres of land, the undermentioned certificates of survey were made out and returned, for and in the name of *Bladen*; but that the same were caveated by Doctor *David Ross*, father to *David*, *Moratio*, and *Archibald Ross*, three of the lessors of the plaintiff, and under whom *William Stewart*, the other lessor of the plaintiff, claims, and adjudged and patented to Doctor *Ross*, to wit: *Turkey Flight*, examined the 18th of November 1762, and patented to *David Ross* on the 25th of December 1762, for 265 acres, 264 acres whereof in the certificate of *Bladen*; and *Buck Lodge*, examined the 22d of November 1762, and patented to *David Ross* on the 25th December 1762, for 420 acres, 210 acres whereof in the certificate of *Bladen*. Also a warrant to *Bladen* for 3000 acres of land, dated the 16th of April 1745; and showed and proved, that 2012 acres, part of the warrant granted

to *George Stuart* on the 3d of February 1746, for 4012 acres, and by him assigned to *Bladen* as herein before stated, were applied to make good and pay the caution money due to the proprietary for so much of the land mentioned in the warrant to *Bladen*, for 3000 acres, dated the 16th of April 1745. The defendant further gave in evidence, that in virtue of the said last mentioned warrant for 3000 acres, the following certificates of survey were made and returned to the land office, and patents thereon issued to *Bladen*, and his assigns, to wit: 300 acres, called *Pleasant Valley*, surveyed the 1st of June 1745, examined and passed on the 14th of June 1763, and patented to *William, Thomson*, and *John Mason*, on the 3d September 1805. 500 acres, called *Walnut Bottom*, surveyed 1st June 1745, examined 12th August 1746, and patented to *George Mason* the 25th March 1756. 240 acres, called *Hunt the Hare*, surveyed in June 1747, examined 16th May 1761, and patented to *George Mason* 23d June 1763. 285 acres, called *Dispute*, surveyed 1st of June 1745, examined 9th November 1745, and patented to *Daniel Cresap* 29th Sept. 1763; and 12 acres, called *Three Spring Bottom*, surveyed November 1746, examined 9th May 1761, and patented to *Daniel Cresap* 29th September 1761, amounting to 1337 acres in the whole. That in virtue of the last mentioned warrant to *Bladen* for 3000 acres, dated the 16th of April 1745, the following certificates were made out and returned for and in the name of *Bladen*, but that the same were *caveated* by *Doctor Ross*, and were adjudged and patented to him *Ross*, viz. *Laurence*, examined 19th November 1762, and patented 25th December 1762, for 82 acres, 160 acres in the certificate of *Bladen*. *Will's Town*, examined 20th November 1762, and patented 25th December 1762, for 1125 acres, 915 acres in the certificate of the said *Bladen*. *Big Bottom*, examined 20th November 1762, and patented 25th December 1762, for 197 acres, 240 acres in the certificate of the said *Bladen*. *The Prized*, examined 19th November 1762, and patented 25th December 1762, for 240 acres, 235 acres in the certificate of the said *Bladen*. *Sugar Bottom*, patented for 304 acres, 121 acres in the certificate of the said *Bladen*. The whole quantity patented to *Ross* 1948 acres. The number of acres in *Bladen's* certificate 1671. Also the certificate for the tract of land called *Pleasant Valley*,

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containing 300 acres, dated the 1st of June 1745, and surveyed in virtue of a warrant granted to *Bladen* on the 16th of April 1745, for 3000 acres, and endorsed, that on the 18th of May 1761, the certificate and plot disagreed in the direction of the 20th course, and was disallowed by the examiner general. It was corrected the 1st of June 1761, and examined and passed the 14th of June 1763. That it was caveated by Doctor *Ross* the 6th September 1763, and on the 14th of June 1763 £10 16 0, for 18 years rent of the land to midsummer 1763, was received by the agent. The certificate was assigned by *Tasker*, attorney in fact of *Bladen*, to Col. *George Mason*, and it was caveated on the 24th of July 1780, by *David Ross*, son and heir at law of Doctor *Ross*. The defendant also offered evidence, that the same certificate was returned to and in the land office, on and before the 4th of February 1762. He also read in evidence the petition of Doctor *Ross*, dated the 6th of September 1763, to the judges of the land office, praying that caveat might be entered against the using of a grant for the land contained in the said certificate called *Pleasant Valley*. stating that *Bladen* had on the 3d of June 1745, surveyed and laid out for him a tract of land called *Pleasant Valley*; that the certificate of survey afterwards remained postponed in the land office, and became subjected to the benefit of the first discoverer, agreeably to his Lordship's proclamation; that the petitioner obtained a special warrant, according to the directions of the said proclamation, to affect and secure the said land, which warrant was executed, and certificate of survey thereof returned to the land office, on which patent had issued to the petitioner for 425 acres, called by the name of *White Oak Level*. That *Bladen's* certificate had, since the petitioner's warrant, been assigned to *George Mason*. He prayed that patent might not issue on *Bladen's* certificate, &c. And to prove that the petition was not true, the defendant read in evidence the special warrant, with the recital thereon, which issued to *Ross* for the land called *White Oak Level*, stating that *Ross*, by his petition to his Lordship's agents, did set forth that there was about the quantity of 300 acres of vacant land, known by the name of *White Oak Level*, lying on the mouth of *Evet's* creek, partly cultivated, by means whereof he conceived the same could not be taken up by a common warrant, he prayed a special war-

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rant to affect and secure it, and that on return, &c. he might have his lordships's grant, &c. he having paid the sum of £15 sterling caution for the same, provided he sued out such grant within two years from the date hereof. The surveyor was therefore directed to lay out and carefully survey, for and in the name of *Ross*, the quantity of 300 acres, be the same cultivated or otherwise, &c. That the caveat entered by Doctor *Ross* on the 6th of September 1763, or that entered by *David Ross*, the son, one of the lessors of the plaintiff, on the 24th of July 1780, against a grant issuing on the certificate for *Pleasant Valley*, were neither of them ever acted upon by the judges of the land-office before the 3d of September 1805, when the caveats having been dismissed by the acts of assembly in the petition herein after mentioned and set forth, the grant herein after mentioned for the land called *Pleasant Valley*, was awarded. The defendant then read in evidence a patent granted to *William Mason*, (the defendant,) *Thomson Mason* and *John Muson*, the sons and representatives of *George Mason* the assignee of *Bladen*, on the 3d of September 1805, for the land called *Pleasant Valley*. He also read in evidence the depositions of *Daniel Cresap*, *Thomas Cresap*, *Jarvis Haugham*, *Elizabeth Guest*, *James Guest* and *James Prather*, taken on the 28th of April 1783, in the former action of ejectment herein before referred to, as to the bounds, possession and cultivations, of *Pleasant Valley* by *Bladen*, and those claiming under him. The parts of the deposition of *Thomas Cresap*, and which are not scored, are "that he had a commission as surveyor of that part of *Frederick* county laying above *Monocacy*; that while he acted as surveyor of the said district two warrants were put into his hands to execute for *Bladen*, on any vacant land he should find, one of which warrants was for 2000 acres, and the other for 3000 acres. Having agreed with *Thomas Prather* to act as deputy surveyor for this deponent, recommended it to *Prather*, to lay out and make some surveys, for *Bladen*, in consequence of the above recited warrants, among which he laid out a certain tract of land, where the deponent was present at bounding the trees and running the land; that three certificates were made out by *Jarvis Haugham* for this land, by the name of *Pleasant Valley*, one of which was given to *Bladen*, one sent to the office, and the other entered on his book in folio 64, and stood fair on said book, both plot and certifi-

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cate, till some time in April 1779. The deponent lodged the book on a particular occasion with *Thomas Jennings*, esquire (a), where it remained about three years, and then it was brought and delivered to the deponent by *Thomas Jacques*, at which time, upon examination, the deponent found the plot and certificate torn out, as it now appears; that the aforesaid tract of land was purchased by *George Mason* many years since, though this deponent cannot recollect precisely how long, but supposes about 15 or 16 years, from *Tasker*, the attorney of *Bladen*. He accordingly applied to the land office for patent on the assignment of the certificate. Some time after this the deponent was summoned by *George Mason* to appear before the judges of the land office, on a day appointed, where he accordingly appeared; at which time and place he found *Doctor Ross* and *Mr. Johnson*, his attorney, and *Mr. Tilghman* attorney for *Col. Mason*, in order, as the deponent supposed, to examine the witnesses; at which time and place appeared *James Prather*, a witness for *Doctor Ross*, who first being examined declared as follows: That the deponent's book, wherein the certificate and plot were, had for some time past been kept at his father's house; that he often perused it, and saw the plot and certificate of the tract of land called *Valley*, entered in the book by the name of *White Oak Level*, and that it was not so now, that the deponent must have altered it; after *Prather* was examined, *Jarvis Haugham* was sworn, who declared that he was employed by *Col. Prather* to make out all certificates that he or this deponent should produce filed notes for; and that he, amongst other plots, made out the plots and certificates of the land called *Pleasant Valley*, in the name of *Bladen*, one of which he entered on the books of this deponent by the name of *Pleasant Valley*, which remained on the said book, when he saw it last, fair and clear, and without any alteration." The deponent then produced his book to them. The deposition of *Jarvis Haugham* is in corroboration of the deposition of *Thomas Cresap*, in that part of the deposition of the latter respecting the actings and testimony given by the said *Haugham* before the judges of the land office. He also stated "that *Col. Cresap* produced the book to the judges, who having examined it, declared it to be as fair a piece

(a) The Register of the Land-Office.

of writing as could be wrote. That upon the deponent's now examining the said book, he finds the leaf, whereon was entered the certificate for *Pleasant Valley*, torn out, as he supposes, by some ill disposed person." The defendant also read in evidence the depositions of *Thomas Prather* and *Joseph Tomlinson*, taken on the 13th of August 1761; also the depositions of *James Prather*, *Jarvis Haugham* and *Aaron Moore*, taken on the 5th of April 1764; and the deposition of *Providence Mountz*, taken on the 3d of October 1764, all taken before the judges of the land office. The deposition of *Thomas Prather* states, that the certificate was returned in 1747; "that some few days after Governor *Bladen* was out of office, Col. *Cresap* gave him, the deponent, a bundle of certificates to take to *Annapolis*, and informed him they were the last of Governor *Bladen's* certificates, and desired him to put them into the land office, which he did, and took a receipt therefor, which he delivered to Col. *Cresap*; that he saw Mr. *Bladen* the morning after he had delivered them into the office, who was vexed with Col. *Cresap* for not having returned the certificates sooner, as it would have saved him several fees of office." The deposition of *Haugham* states, that he made the certificate as deputy for Col. *Cresap* and Col. *Prather*. *Tomlinson* proved, that in 1759 he saw a bundle of Mr. *Bladen's* certificates in the land office. He mentioned the names of sundry tracts included in those certificates, being those herein mentioned, but no mention of *Pleasant Valley*. He saw the same certificates at the same time in the possession of *John Ross*, esquire. He also offered evidence to prove, that before the year 1760 *Bladen*, by his tenants, entered upon the land called *Pleasant Valley*, and occupied and possessed the same by his tenants residing on and cultivating the field, designated on the plots in this cause, by No. 3, &c. and so continued the possession, occupation and cultivation, until the 14th of June 1763, when he sold and transferred the certificate for the land to *George Mason*, who thereupon, in like manner, possessed, occupied and cultivated the same, by his tenants, from the time last aforesaid until his death, which happened in 1793, and that then the representatives of *George Mason* in like manner, by their tenants, possessed, occupied and cultivated the same, from the time last aforesaid until the bringing of

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this ejectment, and ever since. The plaintiff then produced in evidence a petition by Doctor *Ross*, the father of *David*, *Horatio*, and *Archibald Ross*, three of the lessors of the plaintiff, for warrants of proclamation, to affect several of the aforesaid tracts of land surveyed under the warrants granted to *Bladen*, and which tracts, so to be affected, are inserted in the petition, viz. *Sugar Bottom*, containing 235 acres, by virtue of a warrant granted to *Bladen* on the 16th of April 1745, for 3000 acres; *Buck Lodge*, containing 140 acres, by virtue of the same warrant; *Willis's Town*, containing 915 acres, by virtue of the same warrant; *Puzzle*, containing — acres, by virtue of the same warrant; *Black Elk* or *Muddy Lick*, containing — acres; *B.g Bottom*, containing 240 acres; *Turkey Flight*, containing 130 acres; and *Lawrence*, containing — acres. He also offered in evidence, by the statement of the judges of the land-office hereafter particularly mentioned, that warrants of proclamation were not granted, but special warrants, on the following parcels of land, and which are the same as those before mentioned in the defendant's statement, viz. On *Sugar Bottom*, *Buck Lodge*, *Will's Town*, *Prized*, *Big Bottom*, *Turkey Flight*, and *Lawrence*; that the warrants to affect them were first issued on the 16th of January 1761, and that they were renewed on the 4th of February 1762; under which renewed warrants the surveys were made, and patents obtained, as in the defendant's statement; and proved that these warrants were recorded in the land-office, one after the other, in regular succession. He also offered in evidence a special warrant granted to Doctor *Ross*, to affect *White Oak Level*, dated the 16th of January 1761, and renewed the 4th February 1762, under which warrant a survey was made on the 3d of April 1762, the certificate was examined and passed the 22d of November 1762, the sum of £1 was paid the 7th of December 1762, for improvements; 20s. 9d. paid on the 15th of December 1762, for rent to Christmas 1762, and patent granted on the 25th of December 1762. He further offered in evidence the following decision of the judges of the land-office, respecting the lands in the proceedings mentioned, and the confirmation of the chancellor, 'To His Excellency *Horatio Sharpe*, Esquire, Lieutenant-General and Chief Governor of the Province of *Maryland*, and Chancellor and Keeper of the Great Seal thereof.—May it please your Excellency,

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There having been a dispute in the land-office of an uncommon and extraordinary nature, in which *Thomas Bladen*, Esquire, and Doctor *David Ross*, are the persons concerned, we take the liberty, in pursuance of his Lordship's instructions, (by which we are directed in difficult and unprecedented cases to desire your excellency's advice and assistance.) to submit to your excellency, as chancellor, a state of the case or matter depending before us, together with our opinion, hoping you will be pleased to favour us with your excellency's sentiments thereupon. On the 16th of January 1761, Doctor *David Ross* applied to us, in usual form, for warrants under the proclamation of resurvey, and to be allowed the preemption of the following tracts of land: *Wills's Town*, *Buck Lodge*, *Sugar Bottom*, *Turkey Flight*, *Prized*, *Lawrence*, and *Big Bottom*, containing 2254 acres; but as no certificates for those lands appeared to be returned or lodged in the office, which is essential to the issuing of warrants under the proclamation, Mr. *Ross* petitioned for and obtained special warrants to affect the lands aforesaid, having, as your excellency knows is usual, first paid the agent caution for the same. On the 16th of May 1761, the undermentioned certificates were returned to the office, signed by Mr. *Thomas Cresap*, who was deputy surveyor of the county at the times these certificates respectively bear date, viz. *Wills's Town*, surveyed in June 1745; *Buck Lodge* and *Sugar Bottom* in June 1746; *Turkey Flight* and *Prized*, in August 1746; and *Lawrence* and *Big Bottom* in November 1746; containing in the whole 2254 acres, surveyed as is set forth in the said certificates for *Thomas Bladen*, esquire. As the lands described in those certificates appeared to be the same tracts for which Doctor *Ross*, (as we have already observed,) obtained special warrants, we thought it our duty to forbid patents issuing to Mr. *Bladen*, till we could examine the records, and inquire how it had happened that those certificates had laid so long dormant. On examination we found in the land records the following entries—"October 21, 1743. Order issued to the surveyor of *Prince-George's* county, to lay out for his excellency *Thomas Bladen*, esquire, 2000 acres of land, caution to be paid on the return of the certificates, &c. 2000 acres, part of a warrant for 4012 acres, granted Doctor *George Stewart* the 3d of February 1746, and by him assigned his excellency *Thomas*

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*Bladen*, esq. is applied to make good rights to the above warrants. April 15, 1745. Warrant then issued to the surveyor of *Prince-George's* county, to lay out for his excellency *Thomas Bladen*, esq. 2000 acres of land, caution to be paid on the return of the certificate, &c. April 16, 1745. Warrant then issued to the surveyor of *Prince-George's* county, to lay out for his excellency *Thomas Bladen*, esq. 3000 acres of land, caution to be paid on the return of the certificates. Rights made good to 2012 acres, part of this warrant, by applying so much as part of a warrant for 4012 acres, granted said *Bladen* the 3d of February 1746." That your excellency may be thoroughly informed, we think it necessary to lay before you a copy of the original warrants which issued out of the office in consequence of the foregoing entries; and to state, in a distinct manner, the several tracts that were surveyed, and for which certificates were returned into the office by virtue of those warrants respectively: "Lay out for the use of his excellency *Thomas Bladen*, esquire, 2000 acres of land, and return your certificate or certificates of survey thereof within six months from the date hereof, and for your so doing, this shall be your warrant. Given under his Lordship's lesser seal of arms, this 21st of October 1745." The above warrant was renewed in the usual form, and the following tracts of land were laid out by virtue thereof: *Buck Lodge*, 210 acres, and *Sugar Bottom*, 109 acres, both surveyed in June 1746, and claimed by *Ross*, amounting to 319 acres. *Flight to Flemmin*, 100 acres, surveyed April 1744; *Boil's Fancy*, 50 acres, in April 1745; *Beaver Dam Bottom*, 138 acres, ditto; *Lane's Field*, 175 acres, ditto; *Moody's Pleasure*, 50 acres, ditto; *Maiden Head*, 58 acres, ditto; *Barreny Hill*, 80 acres, in February 1745; *Wilchman's Conquest*, 260 acres, in March 1745; *Beaver Dam Bottom Enriched*, 130 acres, in March 1745-6; *Mills Folly*, 100 acres, ditto; *Cove*, 510 acres, in April 1746; and *Cumberland*, 625 acres, in April 1751, amounting in all to 2286 acres. The original warrant, which issued in consequence of the second order, being in the possession of the surveyor, the words therefore cannot be inserted; but the following tracts of land were laid out by virtue thereof: *Turkey Flight*, 264 acres, surveyed August 1746, and *Big Bottom*, 240 acres, surveyed November 1746, both claimed by *Ross*.

amounting to 504 acres. *The Three Spring Bottom*, 248 acres, surveyed November 1746; *Providence*, 240 acres, ditto; *Content*, 240 acres in April 1751; amounting together to 728 acres. "Lay out for his Excellency *Thomas Bladen*, 3000 acres of land, in any part of this province, not formerly surveyed or cultivated by any person, or lands leased or reserved for his Lordship's use, and return your certificate of survey thereof into his Lordship's land office with all convenient speed, with the names of the place, and of what manor to be held; and for your so doing this shall be your warrant. Given under his Lordship's lesser seal of arms this 16th of April 1745. To Capt. *Thomas Cresap*, surveyor of *Prince-George's* county" By virtue of the above warrant the following tracts of land were laid out: *Wills Town*, 915 acres, surveyed June 1745; *Sugar Bottom*, 121 acres, in June 1746; *Prized*, 235 acres, in August 1746; and *Laurence*, 160 acres, in November 1746; all claimed by *Ross*, amounting to 1430 acres. *Three Spring Bottom*, 12 acres, surveyed November 1746; *Walnut Bottom*, 500 acres; *Dispute*, 285 acres; and *Hunt the Hare*, 240 acres; surveyed, June 1747; amounting together to 1037 acres. By this state of the returns from the deputy surveyor, your excellency will observe, that there has been laid out for *Thomas Bladen*, esquire, by virtue of these warrants, 6305 acres, of which 2254 acres are claimed by Doctor *Ross*; and it is also evident that 5200 acres were surveyed before Mr. *Bladen* left this province, (which he did in June 1747,) yet he never made good rights for more than 4012 acres, which was in 1746. Your excellency will observe, that in the order of October 1743, as well as in the other two of the 15th and 16th of April 1745, there are these words—"caution to be paid on the return of the certificates," which is unprecedented, and the more extraordinary, as no special order appears or is referred to. In the 11th article of his Lordship's instructions, dated the 14th of June 1733, is contained the following words: "There shall be in all future common warrants a clause inserted by proviso, that the patent shall be taken out within the space of two years after the date of such warrant, which said clause you are hereby enjoined so strictly to observe as not to suffer the renewal of said warrant after such time, or any patents to issue, contrary to the true intent and meaning

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thereof." It is, as your excellency will observe, expressly ordered, that a conditional clause be inserted in every common warrant, enjoining the person obtaining it to sue out patent within two years from the date of such warrant, nevertheless there is no such proviso or clause in the warrants granted to Mr. *Bladen*, which are therefore, in that respect, repugnant to his Lordship's instructions. We shall conclude our remarks on those warrants with observing, that instead of the usual words, "*return your certificates of survey thereof within six months from the date hereof*," there are inserted in the warrant of the 16th of April 1745, the words following: "*return your certificates of survey thereof into his Lordship's land office with all convenient speed*," which expression, we conceive, can never be construed to imply the space of 15 or 16 years. It appears by an old and imperfect memorandum book in the office, that certificates for *Buck Lodge*, *Sugar Bottom*, *Providence*, *Turkey Flight*, *Bis Bottom*, *Prized*, *Lawrence*, *Cove*, and *Three Spring Bottom*, were returned into the office some time before April 1747; this Mr. *Thomas Cresap*, by his letter to us dated the 6th of August 1761, seems to admit, or rather insist on, and is supposed by the evidence of Col. *Thomas Prather*, who acted at that time as assistant to *Cresap*, and by the deposition of *Joseph Tomlinson*, which deposition with that of Col. *Thomas Prather*, and Mr. *Cresap's* letter, are submitted to your excellency's perusal: But we beg leave to remark, that although all certificates are directed to be returned by the deputy surveyors into the land office, there is nothing more common than for the parties themselves, or for others on their behalf, to withdraw the same; nor can it be otherwise; for until the examiners endorsement appears on the back of each certificate, as well as his Lordship's agents acknowledgment of composition, the certificate is incomplete, and as nothing appears to the contrary it is more than probable, if any regard be paid to *Tomlinson's* deposition, that this was the case with those certificates delivered into the office for Mr. *Bladen* before April 1747. Upon the whole, as Mr. *Bladen* did not pay caution for, or make good rights to more than 4012 acres, though he had it in his power before he left the province, and as no person ever applied on his behalf to pay up caution for the remainder until May 1761, which was after Doct. *Ross* had obtained his

special warrant, and there was a sufficient quantity of land surveyed and unpatented to satisfy both their claims; therefore we are of opinion, that as Mr. *Bladen* has only as yet obtained patents for 1696 acres, that patents do issue to him for 2316 acres more, (he paying the arrearages of rent,) which completes the quantity of 4012 acres, that being the whole for which he has paid caution. We are also of opinion, that patents do issue to Doct. *David Ross*, of *Prince-George's* county, upon the certificates which have been or shall be returned into his Lordship's land office, by virtue of the special warrants obtained by him on the 16th of January 1761, amounting in the whole to 2254 acres, he having paid caution for that quantity; unless Mr. *Bladen*, or his attorney, shall produce an instruction from his late Lordship to support so unusual a proceeding. All which is humbly submitted to your Excellency's superior judgment, by

Your Excellency's humble servants,

*B. Calvert,*  
*G. Steuart.*

November 11, 1762."

"Gentlemen,

The foregoing state of the proceeding on the part of Governor *Bladen*, seems to be very much out of the common course, which I conceive no less than the express authority of, and direction from, the late Lord Proprietary could dispense with, either in Mr. *Bladen's* or any other person's case; and had there been such particular authority from his Lordship, either to the then judges of the land office, his Lordship's agent, or to the governor himself, it ought doubtless to have been entered at large, or at least noticed by some entry on record, to the end that it might always have appeared that his Lordship (who alone could do it,) had dispensed with the usual course of proceeding in the case of Mr. *Bladen*, and that the judges had sufficient warrant for their justification in proceeding after such manner; but their being, by your account, no such special authority from his Lordship to be found in the land office, (which is the proper repository for every thing relating to his Lordship's grants of lands,) nor even the least hint appearing amongst the records that any such order from his Lordship, in favour of Mr. *Bladen*, ever existed, you could not, I apprehend, presume there was any such

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order. The affair being hitherto thus circumstanced, and the several surveys for Mr. *Bladen* having been made on such irregular and unusual warrants, I should have thought that even if no person had applied for warrants to affect the lands, you would have acted justifiably had you declined issuing any patents at all on certificates returned in pursuance of such irregular warrants, till you could have laid the whole affair before his Lordship, and have received his instructions thereupon; but since Doctor *Ross* has applied for and obtained warrants to affect several of the tracts which, according to your statement, had been surveyed for Mr. *Bladen*, the principal thing now to be considered, seems to be, whether Doctor *Ross* has been regular in his application, and (whatever may be done with regard to the rest of the lands,) whether he has a right to patents for the 2254 acres, for which he obtained warrants; and with regard to the regularity of Doctor *Ross's* application to the office on the present occasion, such special warrants as he obtained, seem to me to have been the proper warrants, for as *the lands in question* had been surveyed by virtue of Mr. *Bladen's* warrants, directed by the office to the surveyor of the county, and a minute made in the office of the certificates having been returned, they could not, I apprehend, have been afterwards *affected by a common warrant*; and by what you say in the foregoing statement, no warrants could issue, under the proclamation to affect them, by reason that no certificates on Mr. *Bladen's* warrants were *to be found in the office*; and if under these circumstances such special warrants as were granted to Doctor *Ross* would not affect the lands, it seems to me that a person, for whom land hath been once surveyed, has nothing more to do, than by collusion with the surveyor, or indeed without such collusion, after his certificate shall have been returned to the office, and there minuted, to withdraw it again under pretence of having it examined, of settling with the agent, or some other purpose, and for the future keeping of it in his hands, in order totally to prevent his Lordship from receiving one shilling for the land, either from the party himself, or by sale of it to any other person. The warrants granted to Doctor *Ross* being of such a nature as oblige him, (over and above the caution money paid by him at the time they were obtained,) to pay for any improvements on the land or cultivations, the Lord Proprietary's inte-

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rest seems, in this case, to have been consulted as much in every respect as it would have been had warrants issued under the proclamation; nor do I conceive warrants under the proclamation could do any thing more besides describing the lands, and intimating that the person, for whom the same lands was formerly surveyed, had neglected to sue out patent within the two years, according to his Lordship's *eleventh* instruction, quoted in the above statement. If then Doctor *Ross* has been regular in his application and proceeding, did pay the caution money to his Lordship on obtaining his warrants, and has done every thing in his power to entitle himself to patents, while on the contrary there has been great irregularity and neglect at least on the part of Mr. *Bladen*, and the laying the former under any difficulty would tend to prevent application to the office in future for lands liable to be taken up under his Lordship's instructions, I am of opinion, with you, that patents should forthwith issue to Doctor *Ross* for the 2254 acres, by him affected in the manner above stated.

*Horatio Sharpe.*

"To *Benedict Calvert* and *George Stewart*, Esquires, Chief Judges of the Land Office."

The plaintiff also offered in evidence the Lord Proprietary's instructions to the judges and secretary of the land office, bearing date the 14th of June 1733; the *eleventh instruction* is as follows: "There shall be in all future common warrants a clause inserted by proviso, that the patent shall be taken out within the space of two years after the date of such warrant, and which said clause, you are hereby enjoined so strictly to observe, as not to suffer any renewal of the said warrants after such time, or any patents to issue contrary to the true intent and meaning thereof." The plaintiff also offered in evidence, that *Bladen*, to whom the warrants of the 21st of October 1743, 15th of April 1745, and 16th of April 1745, issued, was from the 21st of September 1742, until the 12th of March 1746-7, the governor of the then province (now state,) of *Maryland*, and did not leave the province until the 16th of May 1747. He also offered evidence, that the certificate called *Pleasant Valley*, mentioned in the defendant's statement, was not returned to the land office before 14th of June 1763. He also offered in evidence by the locations made on the plots in this cause, that the land which is included in the

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survey called *Pleasant Valley*, is the same land taken up and patented to Doctor *Ross*, by the name of *White Oak Level*. He then produced the original certificate of the survey of *Pleasant Valley*, and from the same showed to the jury that there is no entry upon the said certificate made by any clerk or officer in the land office, by which it can be inferred that the same was in the land office, until the 6th of September 1763, when there is an entry thereon that the same was caveated by Doctor *Ross*; and the plaintiff also showed to the jury, by the endorsements thereon, that the said certificate did not pass examination until the 14th of June 1763. He then read in evidence the grant which issued to Doctor *Ross*, on the certificate of *White Oak Level*, dated the 25th of December 1762, for 425 acres. He also read in evidence the following entries from the *Rent Roll* of *White Oak Level*, stating that it was surveyed for Doct. *Ross*, for 425 acres, on the 3d of April 1762, patented 25th of December 1762, and 17s. rent. He also read in evidence the entries from the *Debt Books*, by which *White Oak Level* is charged to Doctor *Ross*. He also offered in evidence, by the production of the original *Rent Rolls* and *Debt Books*, that *Pleasant Valley* is not charged either to *Bladen* or to *George Mason*, or any person claiming under them. He also offered in evidence that Doctor *Ross*, from the year 1761, and before and until his death, which happened in or about the year 1778, resided at *Bladensburg*, about 30 miles from the city of *Annapolis*, the place where the land-office was then held. He also offered in evidence the petition filed on the 3d of September 1805, by the children and devisees of *George Mason*, junior, deceased, son and devisee of *George Mason*, deceased, to obtain a patent for *Pleasant Valley*, and the order passed thereon. The petition stated, that on the 1st of June 1745, *Thomas Bladen* had made for him a certificate of survey, in virtue of a previous legal warrant duly compounded for, including 300 acres called *Pleasant Valley*; that on the 18th of May 1761, the said certificate was rejected by the examiner, because of an error therein; that on the 1st June 1761, it was corrected, and on the 14th of June 1763, examined and passed;—that on the 14th of June 1763, *Bladen* paid up all arrearages of quit rent due;—that on the 14th June 1763, *Bladen*, by his attorney, sold and assigned the certificate of Col. *George Mason*, for a valuable con-

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sideration *bona fide* paid;—that on the 6th of September 1763, Doctor *Ross* entered a caveat against a grant issuing on the said certificate, which was never acted upon;—that after the death of *Ross*, to wit, on the 24th July 1780, *David Ross* his heir at law, also entered a caveat, which was never acted upon, and stands dismissed by the two acts of assembly of *April 1782, ch. 38, s. 2 & 8, and November 1797, ch. 114, s. 11*; that Col. *George Mason* is dead, &c. Prayer for a patent, &c. The chancellor's order, as judge of the land-office, is that patent issue to *William Mason, Thomson Mason, and John Mason*, surviving executors of *George Mason*, late of *Lexington*, and their heirs, in trust for and to the uses mentioned in the last will of the said *George Mason*. He then read in evidence the last will and testament of Doctor *Ross*, dated the 23d of February 1778, devising the residue of his estate, real and personal, (comprising the land called *White Oak Level*,) to his three sons *David, Horatio and Archibald*, equally to them and their heirs, and constituted his wife *Ariana Ross* his executrix. He also offered in evidence, that *Ariana Ross*, in the will named, is also dead; and that *David, Horatio, and Archibald Ross*, three of the lessors of the plaintiff, are the sons of Doctor and *Ariana Ross*, deceased, and that *David Ross*, the lessor of the plaintiff, is the eldest son. He also offered in evidence a deed of trust dated the 14th of August 1799, from *David Ross*, the son, to *William Steuart*, (another of the lessors of the plaintiff,) of all his lands, &c. He also offered in evidence, that the original petition of the 6th of September 1763, is not in the hand-writing of Doctor *Ross*, nor is the same signed by him; but that the said petition is in the hand-writing of *Thomas Hodgkin*, then one of the writers or assistant clerks in the land-office. The defendant then read in evidence a letter produced by the plaintiff, written by *Hodgkin* to Doctor *Ross*, dated the 31st of August 1763, with several marginal notes in the said letter in the hand-writing of said *Ross*, stating, amongst other things, that nothing further had been done with *Bladen's* certificates that he knew of, except those mentioned therein, the locations of which he inserted at his request. “*David Ross's* patent } 300 acres, *Pleasant Valley*, before, by the name of } ginning at two bounded white  
*White Oak Level.*” } oak trees, standing near the river

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bank about a mile below the mouth of *Evert's* creek. 510 acres, *The Cove*," &c. "That those four tracts had been assigned to Col. *Mason*, and the patents made out in his name, though not yet signed by the governor," &c. The defendant used the said letter to prove that *Hodgkin* acted as the agent of *Ross*, and under his authority, and that it was this act of entering a caveat on the 6th of September 1763, which prevented *George Mason* from obtaining a patent for *Pleasant Valley*, at that time. The plaintiff then further proved, that the original dockets kept in the land-office, with respect to caveats, and the entries thereon, and the proceedings relating thereto, have been lost; and that the caveats and proceedings in that office respecting the dispute between *Ross* and *Bladen* in 1761 and 1762, have been lost, and cannot on the strictest examination, be found, except the statement of the judges, with their opinion, and the opinion and decision of the chancellor, and the depositions of *Tomlinson* and *Prather* in 1761, herein before referred to; and that the memorandum book referred to in the report of the judges, is lost; and that the proceedings upon the caveat between *Ross* and *Mason* in 1763 and 1764, except the depositions of *James Prather*, *Jarvis Haugham*, *Aaron Moore*, and *Providence Mountz*, taken in 1764, and herein before referred to, are also lost; and also proved, that until of late years, the time when certificates were returned into the office was not endorsed on the certificates, but was entered in a memorandum book kept for that purpose, and that the said memorandum book is also lost; and further, that *John Ross*, mentioned in the deposition of *Tomlinson*, was examiner-general of certificates, and deputy receiver of the Proprietary quit rents from the year 1743 until the year 1760. And further offered in evidence three orders from the record books of the land-office, the first of the 21st of October 1743, for laying out 2000 acres of land for *Bladen*, the second of the 15th of April 1745, for laying out for him 2000 acres, and the third of the 16th of April 1745, for laying out for him 3000 acres, all of them expressing that the caution was to be paid on the return of the certificates. The plaintiff also offered in evidence the original certificates returned to the land-office under the warrant issued to *Bladen*, (and on which patents were afterwards granted to *Ross* as before stated,) to wit: 264 acres, *Turkey Flight*, sur-

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veyed 8th August 1746, and examined 8th May 1761; 210, *Buck Lodge*, surveyed 13th June 1746, and examined 16th May 1761; 160, *The Laurence*, surveyed 8th Nov. 1746, and examined 16th May 1761; 915, *Wil's Town*, surveyed 1st June 1745, and examined 16th May 1761; 240, *The Big Bottoms*, surveyed 12th Nov. 1746, and examined 18th May 1761; 235, *The Prized*, surveyed 8th Aug. 1746, and examined 18th May 1761; and 230, *Sugar Bottom*, surveyed 13th June 1746, and examined 18th May 1761. The defendant (a) then prayed the opinion of the court, and their direction to the jury, that the patent granted on the 3d of September 1805 to *William Mason, Thomson Mason, and John Mason*, for the land called *Pleasant Valley*, in point of law does relate to the certificate for the said land made on the 1st of June 1745, for *Thomas Bladen*, esquire, to give title to the said *William Mason, &c.* and those under whom they claim, from the said 1st of June 1745; and so far as the land mentioned in the said patent called *Pleasant Valley* is included in the patent for the land called *White Oak Level*, that the former overreaches the latter.

*Pinkney* and *Johnson*, for the Plaintiff, stated, that there were three questions to be argued—1. As to the nature of the contract between the Proprietary and governor *Bladen*, on the 16th of April 1745, when *Bladen* obtained his warrant.

2. What was the actual situation of *Bladen's* certificate of the 1st of June 1745, on the 16th of January 1761, and the 4th of February 1762; and whether the certificate was returned to and in the office when Doctor *Ross* obtained his warrant?

3. As to the time when the composition money was paid on *Pleasant Valley*.

(a) Certain objections were made to certain parts of the statement of facts drawn up by the counsel.

CHASE, Ch. J. So far as the parties agree upon the facts, the court retain the same in the statement; but if objections are made, the court will decide whether what is stated and objected to is legal and proper evidence to prove any particular fact. The counsel must state the fact to be proved, so that the court may judge whether what is stated is legal and proper evidence to prove the fact. Legal evidence must be produced, and the court are to decide on the legality of the evidence. *White Oak Level* is not mentioned or comprehended in the petition of Doctor *Ross* in 1762. The paper dated 30th Nov. 1765, has no relation to *White Oak Level* or *Pleasant Valley*, and is no decision of the judges, but is only a memorandum referring to the decision.

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They denied that the contract for the land ever had a legal inception; if it had, that the terms had not been complied with by those for whose benefit it was made. That if the contract had a legal inception, the plaintiff, and those under whom he claims, had no legal notice of it. They referred to the 3d, 4th, and 11th articles of the Proprietary instructions of the 14th of June 1733. *Hammond et al. Lessee vs. Warfield*, 2 Harr. & Johns. 151. *Peters' Lessee vs. Mains*, 4 Harr. & M<sup>Hen</sup>. 423; and *Land Hold. Ass.* 53, 54.

*Martin*, (Attorney-General,) and *Mason*, for the Defendant.

CHASE, Ch. J. The Proprietary instructions are evidence so far as they are applicable to the subject.

The Court are of opinion, that if the jury upon the whole evidence should find that the certificate of *Pleasant Valley* was returned to the land-office on or before the 4th of February 1762, and was in the office on that day; and also find that the composition was paid on the certificate by the application of as much of *George Steuart's* warrant as was necessary to pay the same, on or before the said 4th of February 1762, that then the patent to *William Mason*, *Thomson Mason*, and *John Mason*, will operate by relation, from the date of the certificate of *Pleasant Valley*, to transfer the legal estate to the grantees in all the land contained within the limits of the grant; although the warrant to *Thomps Bladen*, in virtue of which the survey was made, was irregularly obtained, as no other person had, in the intermediate time between the obtention of the warrant and the 4th of February 1762, acquired an interest in the land to prevent such relation. The plaintiff excepted.

3. The defendant then prayed the court to direct the jury, that the application of part of the warrant granted to *George Steuart*, on the 3d of February 1746, to wit, 2012 acres of that land, to make rights to the land mentioned in the warrant to *Bladen* for 3000 acres, dated the 16th of April 1745, was a good payment on the 3d of February 1746, for so much of the land (to wit, 2012 acres,) mentioned in the said warrant for 3000 acres, dated the 16th of April 1745; and that the application of that quantity of land so paid for, ought in point of law to be made to the surveys

made in virtue of that warrant, in the order in point of time in which the said surveys were made by the surveyor who executed the said warrant. That Doctor *Ross* (the father,) having on the 16th of January 1761, applied to the judges of the land office to affect, by proclamation warrants, five tracts of land surveyed in virtue of that warrant, upon the ground that the caution had not been paid thereon, to wit, the tracts called *Lawrence, Will's Town, Big Bottom, The Prized, and Sugar Bottom*, containing altogether 1671 acres, the issuing of special warrants to the said *Ross* for the said lands, dated the 16th of January 1761, and having in virtue of that application afterwards, to wit, on the 11th of November 1762, by the judgment of the judges of the land office, obtained an order to have patents for the said land; and in virtue thereof did obtain grants for all the said land, thereby leaving only the quantity of 1337 acres of land surveyed for *Bladen*, in virtue of the said warrant for 3000 acres, to wit, *Pleasant Valley* 300 acres; *Walnut Bottom* 500 acres; *Dispute* 285 acres; *Three Spring Bottom* 12 acres, and *Hunt the Hare* 240 acres; the application of the said 2012 acres of land, for which *Bladen* made good right on the 3d of February 1746, ought and must be applied to make good right to the lands called *Pleasant Valley, Walnut Bottom, Dispute, Three Spring Bottom, and Hunt the Hare*.

CHASE, Ch. J. The court are of opinion, and so direct the jury, that if they find the facts as stated by the defendant, that then the same are sufficient in law for them to find that as much of the warrant granted to *George Steuart* on the 3d of February 1746, as was necessary for the payment of the caution on *Pleasant Valley*, was so applied on the 3d of February 1746, and that such application of warrant was a good payment of the caution on the 3d of February 1746, which was then due on the survey of *Pleasant Valley*. The plaintiff excepted.

4. The defendant then offered in evidence, that before the year 1766, it was not the practice in the Proprietary land office of the then province to endorse on certificates of survey the time when they were returned into the office, or to make any entry thereof; and that before that time it was the practice of the Lord Proprietary's survey-

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ors, when they made surveys for individuals upon warrants issuing from the said office, to return to the office the certificate of survey so made, and for the clerk of the office to send that certificate of survey to the examiner general, to be examined, and that the examiner returned the same after he had examined it, to the said office, to be there acted upon. The plaintiff then offered in evidence, that there were instances under the Proprietary government, where the parties themselves, who claimed under certificates, before the certificates were examined, had returned them to the land office, and the officers of that office had sent them to the examiner general for examination. That before the year 1760 it was customary, when certificates were returned to the office to note the same in a memorandum book kept for that purpose, and that the memorandum book has since been lost. That although it was customary for the surveyor, who made out a certificate before the revolution, to return the same to the land office, from whence it was sent to the examiner, yet there was no regulation which prevented the party himself from bringing down his own certificate, and carrying it himself to the examiner, previous to its coming into the land office; and that before the revolution, as well as since, it was the business of the owner of a certificate, which had been examined and passed, to carry the same to the person authorised to receive the composition money, that he might ascertain the sum to be paid thereon, and to pay the said composition money to the person so authorised to receive the same. He further offered in evidence, that all the evidence offered to the jury, as establishing the usage of the land office, and the return of the certificates to that office, was derived from *John Callahan*, now dead, but who was for many years the register thereof; and that the said *Callahan*, at the time of stating said usage and practice, declared that he had no knowledge what was the usage and practice in the land office in the year 1753, and for many years thereafter; and that when he spoke of the usage and practice of the land office, he meant the usage and practice of that office while he was a writer therein, but that he supposed the usage and practice, which had been adopted in former times, was the same. The defendant then prayed the opinion of the court, and their direction to the jury, that these facts, so offered in evidence, are sufficient to prove, that the certifi-

cate of survey for *Pleasant Valley* was duly returned to the land office before the 18th of May 1761, unless the plaintiff can prove the contrary.

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CHASE, Ch. J. The Court are of opinion, that the time when the certificate of survey for *Pleasant Valley* was returned to the land office, is a matter of fact determinable by the jury. They therefore refuse to direct the jury agreeably to the prayer of the defendant. The defendant excepted.

5. The defendant then prayed the court for their opinion and direction to the jury, that *Thomas Bladen*, having had a certificate made out for him for *Pleasant Valley* in 1745, and having paid the composition money thereon in 1746, the entry of *Bladen* by his tenant into that land in 1760, was lawful; and if the jury are satisfied of these facts, and are also satisfied that *Bladen*, and *George Mason*, and *William Mason*, claiming under *Bladen*, have by their tenants held the said land by residing thereon, and by holding a part thereof under actual enclosure, and by cultivating such part, claiming the whole tract, from the year 1760 to the time of bringing this action, that then such entry is in point of law an entry into the whole tract called *Pleasant Valley*; and that such subsequent holding is in point of law a possession of the whole tract, so as to bar, by the adversary possession of the defendant, and those under whom he claims, the right of the plaintiff in this action to recover any part of the land called *Pleasant Valley*.

CHASE, Ch. J. Until there is a grant for the land there can be no rightful possession against the proprietary, so as to bar him by limitations. Where the matter arises *in pais* there it is different, as in the case of escheat. The court refuse to give the direction prayed. The defendant excepted.

Owing to the indisposition of some of the jurors, one of them was withdrawn by consent, and the rest discharged, and the cause continued. The general court having been abolished by the acts of 1804, *ch.* 55, and 1805, *ch.* 16, this action was transferred to *Allegany* county court by the act of 1805, *ch.* 63. It came on and was tried in that court at October term 1806, where the parties gave the same evidence as is herein before set forth, and the follow-

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ing exceptions were taken to the opinions and directions of the court on the prayers submitted.

1. The defendant prayed the court for their opinion and direction to the jury, that the facts offered in evidence are sufficient, in point of law, to prove that the certificate of survey of *Pleasant Valley* was duly returned to the land office before the 18th of May 1761, unless the plaintiff can prove to the contrary. Which opinion and direction the Court, [*Clagett and Shriver, A. J.*] gave accordingly. The plaintiff excepted.

2. The defendant also prayed the court for their opinion and direction to the jury, that the application of part of the warrant granted to *George Stewart* on the 3d of February 1746, to wit, 2012 acres of that land, to make rights to the land mentioned in the warrant to *Thomas Bladen* for 3000 acres, dated the 16th of April 1745, was a good payment on the 3d of February 1746, for so much of the land, to wit, for 2012 acres, mentioned in the warrant for 3000 acres, dated the 16th of April 1745. And that the application of that quantity of land so paid for, ought, in point of law, to be made to the surveys made in virtue of that warrant in the order in point of time in which the said surveys were made by the surveyor who executed the said warrant. That *David Ross*, the father, having on the 16th of January 1761, applied to the judges of the land office, and obtained special warrants to affect by proclamation, five tracts of land surveyed in virtue of that warrant, upon the ground that the caution money had not been paid thereon, to wit, the lands called *Lawrence, Wills Town, Big Bottom, The Prized, and Sugar Bottom*, containing altogether 1671 acres; and having in virtue of that application afterwards, on the 11th of November 1762, by the judgment of the judges of the land office, obtained an order to have patents for the said lands, and in virtue thereof did obtain grants for all the said lands, thereby leaving only 1337 acres of land surveyed for *Bladen* in virtue of the said warrant for 3000 acres, to wit, *Pleasant Valley* 300 acres; *Walnut Bottom* 500 acres; *Dispute* 285 acres; *Three Spring Bottom* 12 acres, and *Hunt the Hare* 240 acres; the application of the 2012 acres of land, for which *Bladen* made good rights as before stated, on the 3d of February 1746, ought and must be applied to make good

rights to *Pleasant Valley, Walnut Bottom, Dispute, Three Spring Bottom and Hunt the Hare*. The court were of opinion, and did direct the jury, that if they should find the facts as stated by the defendant, that the same were sufficient in law for the jury to find that as much of the warrant granted to *George Steuart* on the 3d of February 1746, as was necessary for the payment of the caution money on *Pleasant Valley*, was so applied on the 3d of February 1746; and that such application of warrant was a good payment of the caution money on the 3d of February 1746, which was then due on *Pleasant Valley*. The plaintiff excepted.

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3. The defendant also prayed the opinion of the court, and their direction to the jury, that the patent granted on the 3d of September 1805, to *William, Thomson, and John Mason*, for *Pleasant Valley*, in point of law does relate to the certificate of survey of that land made on the 1st of June 1745, for *Thomas Bladen*, to give title to the said *William, Thomson, and John Mason*, and those under whom they claim, from the 1st of June 1745; and so far as the land mentioned in the patent for *Pleasant Valley* is included in the patent for *White Oak Level*, the former overreaches the latter, and is in point of law to be deemed the elder patent. The court were of opinion, and did direct the jury, that if from the evidence they are satisfied that the caution money was paid upon the certificate of survey of *Pleasant Valley*, by the application of as much of *George Steuart's* warrant, dated the 3d of February 1746, as was necessary to pay the same on or before the 4th of February 1762, that then the patent to *William, Thomson, and John Mason*, will operate by relation from the date of the certificate of *Pleasant Valley*, to transfer the legal estate to the grantees in all the lands contained within the limits of the grant, although the warrant to *Thomas Bladen*, in virtue of which the said survey was made, was irregularly obtained, as no other person had, in the intermediate time, between the obtention of the said warrant and the 4th of February 1762, acquired an interest in the said land to prevent such relation. But if the plaintiff can prove to, and satisfy the jury, that the certificate for *Pleasant Valley* was not returned to the land office before the 4th of February 1762, and was not in that office at that time, then, it is the opinion of the court, that the patent for *Pleasant*

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*Valley* is not entitled to have relation back to the date of the certificate for the said land so as to overreach the plaintiff's patent for *White Oak Level*. The plaintiff excepted; and the verdict and judgment being against him, he prosecuted the present writ of error to this court.

The cause was argued before BUCHANAN, NICHOLSON, and MARTIN, J.

*T. Buchanan*, for the Plaintiff in error, on the *first* and *second* bills of exceptions, referred to *Hammond et al. Lessee vs. Warfield*, 2 *Harr. & Johns*. 152, 154, 155, 159.

*Martin*, for the Defendant in error.

THE COURT concurred with the County Court in the opinion given in the *second* bill of exceptions; but dissented from the opinions in the *first* and *third* bills of exceptions.

The court were of opinion, that the evidence offered to prove that the certificate of survey of *Pleasant Valley*, of the 1st of June 1745, was in the land office at the time when the survey of *White Oak Level* of the 3d of April 1762, was made, and the patent therefor of the 25th of December 1762, was obtained, ought to have been left to the jury. If the certificate of *Pleasant Valley* was not then in the office, *D. Ross*, who claimed under the survey of *White Oak Level*, was a purchaser without notice, and having obtained the first patent, it ought not to be defeated by permitting the patent of *Pleasant Valley*, of the 3d of September 1805, to relate to the certificate of that tract of the 1st of June 1745, and thus overreach the title under the grant of *White Oak Level*.

JUDGMENT REVERSED, AND PROCEEDENDO AWARDED.

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M'MECHEN VS. THE MAYOR, &amp;c. OF BALTIMORE.

ERROR to *Baltimore County Court*. This was an action of debt, brought in the names of *The Mayor and City*. T. Y. executed to the Mayor, &c. a bond as auctioneer, with D. M. as his surety, under an ordinance requiring such bond to be executed before the obtaining a license as auctioneer. The license was granted to T. Y. before the bond was given. After the license and bond, W. and H. sent certain goods to T. Y. to be sold at auction, who sold the same, but did not pay over the proceeds to W. and H. There was no provision in the ordinance authorising such bonds to be used for the use of individuals; but the Mayor gave general directions to the register to deliver copies of the auctioneer's bond to any person having claims against him as such, and a copy of the bond was in pursuance of that order, delivered to W. and H. who brought suit thereon in the name of the Mayor, &c. for their use, against D. M., the surety therein—*Held*, that they were entitled to recover.

If goods are sent to an auctioneer, with directions to sell them at public auction, and he sells them at private sale, without authority, and does not pay over the proceeds, his bond as auctioneer is liable.

Council of Baltimore, for the use of *L. Hollingsworth* and *A. A. Williams*, against the defendant, (now appellant,) on a bond, executed on the 10th of February 1803, by *T. Yates*, *M. Mechen*, (the defendant,) and *J. Walsh*, in the penalty of \$3000, with the following recital and condition.

"Whereas the above bounded *Thomas Yates* hath obtained from the mayor a license of admission under the seal of the city of *Baltimore*, to use and exercise the trade and employment of auctioneer within the said city; and by an ordinance of the corporation of the said city persons obtaining such license are directed, before they take upon themselves the duties of said office, to give bond, to be approved by the said mayor, for the faithful performance of the several trusts and duties required of them by the aforesaid ordinance. Now the condition of this obligation is such, that if the above bounden *Thomas Yates*, do and shall pay, and duly satisfy, all just claims that may be against him as auctioneer, and in all things well and faithfully perform the several duties required of him by the ordinance, entitled, An ordinance for licensing and regulating auctions within the city of *Baltimore*, and precincts thereof, then this obligation to be void, else to be and remain in full force and virtue." The declaration was in the usual form.

The defendant pleaded, 1. General performance. 2. That *Yates* obtained his license as auctioneer before he had given bond. 3. That no license was granted to *Yates* after he had given bond. The plaintiffs replied to the first plea, averring a nonperformance, and setting out the ordinance of the 20th of February 1801. That *Yates* on the 10th of February 1803, after the making of the writing obligatory aforesaid, on his application to the mayor, obtained from him a license as auctioneer for the term of one year, and that he acted as such for one year. That *Hollingsworth* and *Williams*, on the 15th of July 1803, delivered and entrusted to *Yates*, as auctioneer, certain goods and merchandize, to wit, four pipes of gin of the value of \$487 30, to be by him sold as auctioneer, at auction, on their account, and for their use and benefit. That *Yates* did sell the said goods at auction for the sum of \$474 97, over and above his commission, &c. That *Yates* received the money which he had not paid over, &c. To the second plea there was a similar replication—that *Yates* did not obtain his license as auctioneer before he duly executed and delivered to the

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plaintiffs a bond, with security to the satisfaction of the mayor. To the *third* plea they replied, that after *Yates* had duly executed and delivered to the plaintiffs his bond with security, to the satisfaction of the mayor, the mayor granted to *Yates* a license, &c. Issue joined on the replication to the first plea. The defendant rejoined to the second replication, that *Yates* never did, as auctioneer, sell the said goods, &c. belonging to the said *Hollingsworth* and *Williams*. To the third replication he rejoined, protesting that the said goods were not delivered to *Yates* to be by him sold as auctioneer, but that the said *Yates* was requested by *H. & W.* to sell the said goods at private sale, and that he did, at their request, sell the said goods at private sale. The plaintiffs surrejoined to the rejoinder to the second replication, that *Yates* did sell the said goods at auction. Issue joined. To the rejoinder to the third replication they surrejoined, protesting that the goods were delivered to *Yates* to be by him sold as auctioneer; that they did not request him to sell the said goods at private sale. Issue joined.

1. The plaintiffs at the trial, offered in evidence the bond declared upon, and proved that it was executed by the persons whose names were thereto subscribed; and also gave in evidence, that a license was granted to *Yates*, as auctioneer, after the execution and delivery of the bond. They further proved, that *Williams & Hollingsworth* sent to *Yates*, after the execution and delivery of his bond, and after the granting the said license, and before the end of a year thereafter, the goods and merchandise in the replications mentioned, to be sold at public auction, and that they were sold at public auction, and the sum of money in controversy was by him, the said *Yates*, received and not paid over by him to *Williams & Hollingsworth*. The plaintiffs further gave in evidence, that the mayor of the city of *Baltimore* had previously given general instructions to the register to deliver copies of the said bond to any person having claims against *Yates*, as auctioneer, and that the bond, upon which this suit was instituted, was in pursuance of the said instruction, delivered to *Williams & Hollingsworth*. The defendant then prayed the opinion of the court, and their direction to the jury, that upon this evidence the action could not be sustained

for the use of *Williams & Hollingsworth*. This direction the Court, [*Nicholson*, Ch. J. and *Hollingsworth*, A. J.] refused to give. The defendant excepted.

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2. Evidence was then offered that the gin mentioned in the replications was sent to *Yates*, as auctioneer, to be sold at public auction, but that he was instructed not to sell it for less than a certain price. That it was offered for sale several times at public auction, without bringing the price limited; and that afterwards *Yates* had an offer for it at private sale, to the amount of the limit, and that he then sold it, which was his usual and common course in cases of goods sent to him to sell, and that such course of business was well known to the merchants of *Baltimore* for many years. The defendant then prayed the court to instruct the jury, that if they believed these facts, the plaintiffs were not entitled to recover. But the court directed the jury, that if they believed the gin to have been sent to *Yates* to be sold by him at public auction, and that he sold it at private sale, without the authority of *Williams & Hollingsworth*, and did not pay over the proceeds, that it was a breach of the condition of his bond as auctioneer. The defendant excepted; and the verdict and judgment being against him, he brought the present writ of error.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

*Martin* and *Pinkney*, for the Plaintiff in error, contended, that an individual could in no case sue on a public bond, unless the law, under which the bond was taken, authorised such a suit; and that as the ordinance of the corporation of *Baltimore* of the 20th of February 1801, under which the bond upon which this action was brought was taken, contained no such provision, this suit could not be sustained. They referred to the acts of 1715, *ch.* 39, *s.* 39; *ch.* 46, *s.* 4, 7; 1716, *ch.* 1, *s.* 3, 5; 1729, *ch.* 24; 1742, *ch.* 10, *s.* 2, 3, 7; Feb. 1777, *ch.* 8, *s.* 6; 1784, *ch.* 61, *s.* 4; 1785, *ch.* 72, *s.* 2, 8, 9, 10; 1790, *ch.* 12; 1794, *ch.* 54; 1798, *ch.* 101, *sub ch.* 3, *s.* 10, *sub ch.* 12, *s.* 4. *Sterryton vs. Day*, *Styles*, 18. *Arlington vs. Merricke*, 3 *Saund.* 412, 413, 414, 415, (and note.) *The State*, use of *M'Nielly vs. Waites*, 3 *Harr. & M'Hen.* 241.

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*Harper and Winder*, for the Defendants in error, relied on *M-Meehen vs. The Mayor, &c. of Baltimore*, 2 Harr. & Johns. 41.

THE COURT, on both bills of exceptions, concurred in the opinions given by the court below.

JUDGMENT AFFIRMED

MAY.

SHELL VS. THE STATE, use of SOWER.

A plea of the act of limitations is a bar to an action on a bond given to the state, by a trustee appointed under a decree of the court of chancery for the sale of the real estate of a deceased person, &c. where the bond was executed more than twelve years before the institution of the action. As where A Q was appointed a trustee, under a decree of the court of chancery, to sell the real estate of J S, deceased, and gave bond as such to the state, with J M and C S, his sureties, on the 20th of December 1795, and the action was brought on the bond against C S, one of the sureties, on the 4th of May 1809, who pleaded the act of limitations, to which there was a general demurrer. The demurrer was overruled.

Where the replication to a plea of general performance in an action on a bond given by a trustee appointed under a decree of the court of chancery for the sale of the real estate of J S, sets out the decree, but does not make a profert of it, and states that by the decree, which was in the usual form, the trustee was directed to bring into the court of chancery the money arising from any sale by him made, to be applied, under the chancellor's directions, to the purposes mentioned in the will of J S: that the trustee accepted the trust, gave bond, made the sale, took bonds, and received the money. The will of J S was set out, showing the share and interest of L S, (for whose use the suit was brought,) in the money arising from the sale. The breaches assigned were, that the trustee neglected to return an account of his proceedings, or the bonds, or the proportion of the money to which L S was entitled, to be applied, under the chancellor's direction, to the payment of the share of L S, as directed in the will. To this replication there was a general demurrer, which the county court overruled: but on appeal reversed

APPEAL from *Frederick County Court*. Debt brought on the 4th of May 1809, on a bond dated the 20th of December 1795, executed by *Allen Quynn*, Jr. together with *Isaac Mantz* and *Charles Schell*, (the defendant and now appellant,) as his sureties, conditioned, that if the said *Quynn* should well and faithfully perform the trust reposed in him by the chancellor, by decree dated the 8th of December 1795, appointing him trustee for selling the real estate of *John Sower*, deceased, or any further decree or order in the premises, then, &c. The defendant pleaded — 1. That the thing in action, in virtue of the writing obligatory in the declaration mentioned, and the condition thereof, was above twelve years standing at the time of the impetration of the original writ in this cause. 2. That *Quynn* did not, within twelve years next before the impetration of the original writ, commit any breach of the trust reposed in him by virtue of the decree of the chancellor, mentioned in the condition of the bond, or by virtue of any other order or decree in the premises mentioned in the said decree; and that the thing in action in the said specialty mentioned, was above twelve years standing before the day of the impetration of the original writ. 3. General performance of the trust, &c. by *Quynn*. 4. General performance of the condition of the bond, &c.

To the *first* and *second* pleas the plaintiff demurred. To the *third* plea the plaintiff replied, setting out the decree, which, after appointing the trustee, directing the bond to

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be given, terms and manner of sale, &c. as is usual in such cases, directs that the trustee shall bring into the court of chancery the money arising from any sale by him made, to be applied under the chancellor's directions, to the purposes mentioned in the last will and testament of *John Sower*. The decree also directs, that as soon as conveniently may be after any sale, the trustee shall return to the court of chancery a full and particular account of his proceedings. Also, that he shall return the bond or bonds by him taken from the purchaser or purchasers. And also, that nothing done under that decree shall be effectual, unless *Philip Sower*, son of the deceased, had attained the age of 15 years, (as mentioned in the will of the deceased.) The replication then states, that the trustee accepted the trust, gave the bond, &c. made the sale the 4th of April 1796, took the bonds of the purchaser, and that he received the money the 25th of October 1797. It sets out the will of the deceased, with averments showing the share and interest of *Jacob Sower*, (for whose use the suit is brought,) in the money arising from the sale; and that *Philip Sower*, mentioned in the will and decree, had attained the age of 15 years before the decree was passed. The breaches assigned were—1. That the trustee neglected and refused to return an account of his proceedings to the court of chancery. 2. That he did not return the bonds taken for the purchase money as aforesaid. And 3. That he did not return the proportion of the money to which *Jacob Sower* was entitled, to be applied, under the chancellor's directions, to the payment of the share of *Jacob Sower*, as directed in the will. To the *fourth* plea, the replication was in substance the same with the preceding. To the replications to the *third* and *fourth* pleas, the defendant demurred generally. The County Court gave judgment on the demurrers for the plaintiff. From that judgment the defendant appealed to this Court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J.

*Brooke*, for the Appellant, contended, that the county court ought to have allowed the pleas of limitations; that the saving in the act of limitations, which relates to bonds given in the name or for the use of the state, is to be construed to mean only bonds which are given for the pay-

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ment of *money*, either directly or indirectly, to the state, and that it never was intended to extend to bonds where the name of the state was used merely for the purpose of facilitating the remedy of a private person, and in the performance of the condition of which bond the state had no interest or concern either directly or indirectly. Another objection to the judgment below was, that the breach assigned was not within the words or meaning of the condition. The condition is, that the principal in the bond, (who is a trustee to sell real estate,) should perform the decree, or any future order or decree in the premises. The order or decree should be set out, and as it is a matter of record, a *profert in curia* should be made, and the breach assigned in the nonperformance of the decree or order. The replication is double, and it is argumentative, and contains matter which ought to be shown in evidence to the court, as necessary to authorise a suit on the trust bond for the use of *Sower*, to be so brought, and the writ to be so endorsed, but is improper matter to be alleged in the replication to show the interest of *Sower*, and that he had a right to bring the action in the name of the state for his use. It is contended that *Sower*, ought either to have procured a special order of the court of chancery for the payment of his share of the money arising from the sale, or that there should have been an order of the court of chancery directing the bond to be put in suit by the new trustee. In the first case the breach could have been assigned in the nonpayment of the money due *Sower*, according to the order of the chancellor; and in the latter case the nonpayment of the money to the new trustee, according to the order of the court in the premises. For any thing that appears in this record, *Sower* may not be entitled to any of the money arising from the sales, as it is to be disposed of by the order of the court of chancery.

*Taney*, for the Appellee. In support of the demurrers to the pleas of limitations, it will only be remarked, that bonds "*taken in the name or for the use*" of the state, are expressly excepted in the act of 1715, *ch.* 23; so that this case is within the words and spirit of the excepting clause. It was found necessary, at a subsequent period, (1729, *ch.* 24, s. 21,) to pass a new act of limitations as to testamentary and administration bonds, they being given to the state. No authorities are cited in support of the objec-

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tions to the replications. The trustee was appointed in this case under the act of 1785, *ch. 72, s. 4*. The action on the bond is given in the same act, *section 8*. It is believed that no rule of proceeding required the decree to be plead with a profert by the plaintiff, nor is any thing stated in the replications but what is necessary to show the interest of *Jacob Sower*, and his right to sustain the action on the bond, under the act of assembly. But as the case now stands, neither of these objections can avail the defendant, as the want of a profert, and duplicity in pleading, can be taken advantage of only on special demand. The demurrers to these replications are general. The different breaches are assigned in the replications according to the statute of *Wm. III. Gainsford vs. Griffith, 1 Saund. 58, (note 1.)* The act of assembly before cited, does not compel the party interested to pursue the course pointed out by the appellant's counsel. It gives his remedy for any breach of the condition directly on the bond. The breaches assigned are, by the demurrers, admitted to have been committed. By the law of 1785, *ch. 72, s. 8*, any party interested who is aggrieved by the trustee, is authorised to support his action on the bond, and to recover judgment for the damages actually sustained by him. It does not compel him to wait until the account of the trustee is liquidated. but gives him a right to sustain his action whenever he is aggrieved. The only questions then are, 1. Is he interested? 2. Is he aggrieved? His interest is distinctly set forth in the replications, and admitted by the demurrers; a certain portion of the money arising from the sale of the land is devised to him by the will of his father. The decree directs, that the money arising from the sale shall be brought into court, to be applied, under the chancellor's direction, to the purposes mentioned in the will. It does not appear that there were any debts to affect it; and in fact there were none. The party, therefore, for whose use the suit is brought, is clearly interested, and the trustee has broken the condition of his bond in that part in which he is interested, by not bringing the money into the court of chancery, to be applied to the payment of *Sower's* share, as the decree directed should be done. It is equally manifest that he is aggrieved by the misconduct of the trustee. He has been prevented from receiving his share of his father's estate. The money, rightfully due to him, has been

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withheld by the trustee, and retained in the trustee's own hands. This is surely an injury done to *Sower*. He is thereby aggrieved. He seems, therefore, to be completely within the description of persons to whom the law gives a right to sustain an action on the bond. He is a party interested, and he is a party aggrieved; whenever this is the case the law gives the remedy on the bond. The damages sustained are fixed by agreement, as appears by the record. The situation of this case shows the justice and necessity of giving the remedy now sought. It is a case that may often happen again. The trustee died many years ago. There was, it is believed, no administration on his estate. He left no property worth an administration. The trustee being dead, no order can be passed on him by the chancellor. There is no administrator to be made a party before the chancellor. The securities are not parties to the proceedings, and no order can be passed on them. No report of the sale has been made, as appears by the record, and in fact none was made. Who then could now be called on to report the sale, and settle the account? Not the trustee, for he is dead—not his administrator, for there is none—not the securities, for they are not parties to the trust—And if a new trustee were appointed, he could only settle his own account, and report his own proceedings. He would have nothing to settle, for the land is sold, and the money received by the former trustee; and there seems to be no one on whom the chancellor could call to report the proceedings of the former trustee, and settle his account, or on whom an order could be passed to pay over the money to a new trustee, to enable him to settle the trust. If an administration is necessary in order to liquidate the accounts of the trust, it would hardly be required, that the parties interested in the sale should administer on an insolvent estate, and incur the trouble, risk and expense, of the administration, for which they could receive no compensation. They never agreed to be responsible for the conduct of the trustee. The securities in the bond have undertaken that responsibility, and if an administration is necessary to protect them, they ought to encounter the burthen. The difficulty has arisen from the misconduct of the trustee in not reporting his proceeding, and settling the trust. If a new trustee has become necessary, that duty and expense ought to fall on them, for the same reason.

If there are any allowances or deductions that ought to be made in favour of the trustee, it is their business to show them, and to take the steps that may be necessary for that purpose. Indeed, if there were any such deductions, they might have shown them, in mitigation of damages, at the trial of the action on the bond, and could then have obtained any deduction from the claim of *Sower*, to which the trustee was entitled, or they might yet obtain it by application to the court of chancery. But there is no dispute about the damages—they are fixed by the agreement.

This is the case of a child claiming his share of his father's estate. He has been injured by the misconduct of the trustee. If he must go into chancery, and liquidate the account, before he can call on the securities, it will subject him to costs, trouble and expense, for which the securities will not be bound to compensate him; it will make him chargeable in part for the misconduct of the trustee. The securities in the bond agree to bind themselves, and do bind themselves for the trustee's fidelity. The bond is intended for the protection of parties entitled to the money, who are frequently infants; and if a loss must be sustained, any expense or trouble incurred by the bad conduct of the trustee, it seems just, and in the true spirit of the act of assembly, should fall on the securities.

JUDGMENT REVERSED.

HARRIS VS. JAFFRAY, use of GWYNN.

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APPEAL from Baltimore County Court. This was an action of *Trover*, brought in the late General Court to Oc-

The plaintiff may require the person, for whose use the action was instituted, to pro-

duce the assignment, if any he hath, under which he claims the use.

If a verdict is given for a larger sum than the damages laid in the declaration, the plaintiff may before judgment release the excess, and take a judgment for the amount of the damages laid; or if after judgment, but during the same term, he tenders a *remittitur* of a parcel of the verdict, the court may strike out the judgment, and enter a judgment for the amount of the damages charged in the declaration.

If a judgment is entered upon a verdict for more damages than laid in the declaration, no release, or other act of the plaintiff, can give validity to that judgment, but on an appeal, or writ of error, it must be reversed; and the law in that respect is not altered by the act of 1809, *ch. 153*.

But under the acts of 1809, *ch. 153*, and 1811, *ch. 161*, where, by an inquisition on an inquiry at bar, the jury assessed a larger amount of damages than was laid in the declaration, and judgment was rendered for the sum found by the inquisition, on an appeal by the defendant the court of appeals permitted the plaintiff to release the excess, and enter the release on the record, and they amended the record by entering a judgment for the damages laid in the declaration.

Where the record stated that the jury, on an inquiry at bar under the act of 1794, *ch. 46*, were charged to inquire of the damages sustained by the plaintiff, omitting and costs, and the inquiry was not stated to be on motion of the plaintiff. *Quere*. Whether these were fatal errors?

In an action of *trover*, the defendant, at a subsequent term, after issue had been joined on his plea of not guilty, filed another plea, viz "And the said D, by Z H his attorney, comes and defends the force and injury when, &c. and says that the said P his action aforesaid further against him to have and maintain ought not, because he says," &c. then setting forth that P had, at the preceding term of the said court, obtained a judgment in an action of *trover* against W T, for conversion of the same goods, &c. and concluding the plea—"And this the said D is ready to verify, wherefore he prays judgment if the said P his action aforesaid against him to have and maintain ought," &c. To this plea there was a general demurrer. *Quere*. Whether it was a second plea in bar, or a plea *pais darrein conclusion*?

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tober term 1796, for the conversion of three boxes, containing 1326 pieces of gold coin, commonly called half johannes, of the value of £4000 current money. The damages laid in the declaration were £5000 like money. The defendant, (now appellant,) at May term 1797, pleaded not guilty, upon which issue was joined. At May term 1798, the defendant filed the following plea, stated to be a *plea puis durrein continuance*. viz. "And the said *D. Harris*, by *Z. Hollingworth* his attorney, comes and defends the force and injury when, &c. and says that the said *J. Jaffray*, his action aforesaid further against him to have and maintain ought not, because he says, that the said *Jaffray*, by *J. Winchester* his attorney, heretofore, to wit, on," &c. setting forth another action brought by the present plaintiff against *William Thompson*, for trover and conversion of the same boxes of half johannes, as described in the declaration in this cause, and that a judgment by confession was rendered against *Thompson* at October term 1797, and that the said judgment was in full vigour and effect, and no wise reversed or annulled; averring that the plaintiff in that action, and the plaintiff in this, was the same person, and that the goods, chattels and money, and the finding and conversion thereof, mentioned in the record and proceedings against *Thompson*, and the goods, &c. mentioned in the declaration in this action, are also the same. "And this the said *D. Harris* is ready to verify; wherefore he prays judgment if the said *Jaffray*, his action aforesaid against him to have and maintain ought, &c." To this plea there was a general demurrer, and joinder in demurrer. At March term 1807, (the proceedings having been transferred to *Baltimore* county court on the abolition of the general court,) the demurrer was adjudged good. The defendant then moved the court to amend the pleadings, by putting in a plea of the general issue, which he tendered to the court; but the court refused to sustain the motion, and on motion of the plaintiff ordered a venire for a jury to appear at the next term, to inquire what *damages and costs* the plaintiff had sustained, &c. At the next term, (October 1807,) "a jury was ballotted, empannelled and accepted, elected, sworn, and charged to inquire of the damages and costs sustained by the plaintiff in the premises." The jury returned their inquisition, under their hands and seals, as follows: "This

Inquisition made, indented and taken, at bar, in *Baltimore* county court, in an action of trover, depending in the said court between *James Jaffray*, plaintiff, and *David Harris*, defendant, witnesseth, that we the jurors, whose names are hereto subscribed, and seals affixed, being duly empannelled, sworn, and charged to inquire of the damages and costs sustained by the said *James Jaffray* in the said action, by reason of the conversion of certain goods and chattels of the said *James Jaffray*, by the said *David Harris*, to his use, having heard the evidence given in the said action, and duly considered the same, do find the damages sustained by the said *James Jaffray* in the said action, to the sum of fourteen thousand five hundred and sixty dollars and forty cents current money, and the sum of forty dollars, costs of the said suit. In witness whereof we have hereto set our names and seals this," &c. Judgment was rendered upon this inquisition for \$14,560 40 current money, damages, and \$40 costs. From that judgment the defendant appealed to this court.

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At December term 1809 of this court, on motion of the appellant, it was ruled by the court, that *William Gwynn*, (for whose use this suit was entered,) on or before the second day of the next term of this court show cause, if any he hath, why he shall not produce to this court the assignment, if any he hath, under which he claims this suit for his use. The assignment above required was produced. At the same term, on motion of the appellee, it was ruled by the court, that the appellant, or his counsel, show cause why the appellee should not be permitted to release so much of the damages, assessed by the jury in this case, as exceeds the amount of damages laid in the declaration, and to amend the record by entering the judgment for the said amount of damages so laid in the declaration. This rule to show cause was argued at June term 1811, before POLK, BUCHANAN, and EARLE, J.

*Key* and *Shaaff*, against the rule, contended, 1. That it was error if a judgment was entered for more damages than laid in the declaration. 2. That when a defendant brings a writ of error or appeal, and the case is brought before a superior court, there can be no judgment, but simply a reversal if it is erroneous; but if a plaintiff brings a writ of error or appeal, then the court, if they reverse

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the judgment, may give such judgment as the inferior court ought to have given if there is no bill of exceptions in the case.

On the *first* point, they referred to *Hoblins vs. Kemb-ling*, 1 *Bulstr.* 49. *Way vs. Lister*, 2 *Stra.* 1110. *Pilford's case*, 10 *Coke*, 115; and *Chevelly vs. Morris*, 2 *W. Blk. Rep.* 1300.

On the *second point*, they cited 2 *Bac. Ab.* tit. *Error*, 503. *Parker vs. Harris*, 1 *Salk.* 262. *Samuel vs. Judin*, 6 *East*, 263; and *Herle vs. Pender*, 3 *Bro. P. C.* 505.

They also contended that the act of 1809, *ch.* 153, *s.* 2, did not embrace the case, and that the court could not permit the amendment to be made under that act.

*Harper*, in support of the rule, relied upon the act of 1809, *ch.* 153, *s.* 2, which is in the following words, viz. "That where any verdict shall be given in any action, suit or demand, in any court of record of this state, the judgment thereupon shall not be stayed or reversed for any defect of form or substance in any writ, original or judicial, or for any variance in such writs from the declaration or other proceedings, nor for defects in any count in the declaration, so that there be one good count; and if the court of appeals should be of opinion, that there appears to be sufficient matter of substance in the record and proceedings on any appeal or writ of error, to enable them to proceed thereon, the same shall not be reversed or dismissed for want of form; and the court may, on motion, permit and direct any entry to be made, or act to be done, by either party, on the trial of any appeal, or during its pendency, which might or could have been done by such party after verdict, in the court from whose judgment such appeal was made, and which in law might have been necessary to give effect and validity to such judgment.

*Curia ad. vult.*

At December term 1811, the opinion of the court was delivered by

BUCHANAN, J. If a verdict is given for a larger sum than the damages laid in the declaration, the plaintiff may, before judgment, release the excess, and take a judgment for the amount of the damages laid; or if after judgment rendered upon the verdict, but during the same term, he

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tenders a *remittitur* of a parcel of the verdict, the court may strike out the judgment on the verdict, and enter a judgment for the amount of the damages charged in the declaration. But if a judgment is entered upon the verdict, no release, or other act of the plaintiff, can give validity to that judgment, but on an appeal or writ of error, it must be reversed, unless the act of 1809, *ch. 153*, on which the rule in this case is founded, affords a remedy.

And the only question for the court is, Whether the law in that respect is altered by the act of assembly? The words of the act are, that the court of appeals "may, on motion, permit and direct any entry to be made, or act to be done, by either party, on the trial of any appeal, or during its pendency, which might or could have been done by such party after verdict, in the court from whose judgment such appeal was made, and which in law might have been necessary to give effect and validity to such judgment."

This clause of the law in no manner affects the proceedings in the county courts, and authorises no acts to be *there* done, or entries made, which could not have been done before; nor does it give any efficacy to any acts or entries *there* done or made by either party, to a suit, which the same acts or entries would not have had in law before, but only authorises such entries to be made, or acts to be done, in the *court of appeals*, by either party to a suit, (and not by the court,) which might have been made or done by the same party in the *court below*, after verdict, without giving any efficacy to such acts or entries when made in the *court of appeals*, which the same acts or entries would not have had if made in the county court.

Independent of this act of assembly, if *after a remittitur* is entered, a judgment is rendered by the court, on a verdict for more than the damages in the declaration, or if the *remittitur* is entered *after* judgment, and that judgment is suffered to remain, in either case the judgment is erroneous, and not cured by the *remittitur*; a release of parcel of a verdict, not having the effect in law to give validity to a vicious judgment for the whole; and no entries or acts being authorised to be made in the county courts by either party to a suit, which might not before have been made after verdict; and no efficacy being given by the act of assembly to such acts or entries, when made in the court of appeals, which they would not have had, if made in the court be-

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low, it does appear to the court, that a release entered in this court of parcel of a verdict, cannot give validity to a judgment rendered by a court below, for the whole of that verdict, being for a greater amount than the damages laid in the declaration; for that would be giving greater efficacy to a release entered in this court, than the same act would have if entered in the court below, a release entered below of a parcel of a verdict, not having the effect in law to give validity to a vicious judgment for the whole. Suppose, *then*, the record before this court contained a release, entered below by the plaintiff, of a parcel of the *inquisition*, there would then be no act to be done by the party, in virtue of the act of assembly. and the judgment being for more than the damages charged in the declaration, it would be erroneous; and could this court be called upon to affirm that judgment thus clothed in error? They surely could not; nor could this court amend or alter it in conformity with the release, but would be constrained to reverse it; which shows, that the sum for which a judgment is given, is a substantial part of it, and cannot be altered without altering the judgment. And the court think there is nothing in the act of assembly giving authority to this court to make any alteration or disposition of a judgment on release entered here, which they could not make of the same judgment on a *remittitur* entered in a court below. The court are therefore of opinion, that even if a release is permitted to be entered in this case of a part of the *inquisition*, they cannot alter the amount of the judgment, which would in fact be to enter a judgment of their own, and then to affirm that judgment; so that there would be in the record no judgment of the court below; nor can this court reverse it, and give a judgment for the damages charged in the declaration, for it is well settled, that on an appeal by a defendant, the judgment cannot be reversed, and such a judgment entered for the plaintiff, as the court below ought to have given, and the act of assembly makes no alteration in the law in that respect. The defendant applies to be *relieved* from an erroneous judgment, and not to have a more perfect one entered against him; and he is driven to his appeal, by the act of the plaintiff in taking a judgment against him for more than by law he is entitled to. If in this case the judgment was for the amount of the damages in the declaration, the *inquisition*

being for more, and *no release* entered on the record, the plaintiff might enter one now. But however this court feel disposed to give effect and operation to the acts of the legislature, they think they cannot, by construction, strain the act in question to a meaning which the language of it will not bear, and thereby take to themselves an authority which the law, (whatever may have been the intention of the makers,) does not give.

The court therefore think that the rule ought to be discharged.

POLK, J. Dissented.

#### RULE DISCHARGED.

At the same term it was ruled by the court, on motion of the appellee, that the appellant show cause why the appellee should not be permitted to release so much of the damages found by the jury in this case, as exceeds the amount of damages laid in the declaration therein, and to enter such release on the records of this court. And also show cause why this court, after the release and entry aforesaid, should not amend the transcript of the record in this case by entering such judgment, on deciding the appeal, as the nature of the entry or amendment may require, or as the court from which the appeal has been made would have rendered if such entry or amendment had been made before the rendition of the judgment in the said inferior court.

At December term 1813, this rule was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, EARLE, and JOHNSON, J.

*Pinkney, Key and Shaaff*, against the rule. The motion and rule, they said, had been submitted by the appellant under the act of 1811, *ch. 161*, passed since this court discharged the former rule, as not being embraced by the act of 1809, *ch. 153, s. 2*. And which act of 1811, *ch. 161*, seemed to have been made expressly to take in this case. By the *third section* it is enacted, "that no judgment in any case shall be reversed in the court of appeals because the verdict was rendered and the judgment entered in the court below for a greater sum than the amount of damages laid in the declaration; but the plaintiff below, or his legal representative in the court of appeals, shall be permitted, on motion in that court, in

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every such case, to amend the transcript of the record of proceedings, by entering a release upon the record of the damages exceeding those laid in the declaration, and the court of appeals shall proceed, upon such amended transcript, in the same manner, and give the same judgment in the case, as if the said release had been entered upon the record before judgment in the court below." And by the *fourth section* it is enacted, "that in all cases where the court of appeals shall have permitted or directed any entry to be made, or act to be done, on the trial of any appeal, or during its pendency, in virtue of any act of assembly of this state, which may require an alteration of the judgment given by the court from which such appeal was or shall be made, or which, if made in such inferior court, would have authorized or required a different judgment to have been given, the court of appeals may direct such judgment to be entered, on deciding such appeal, as the nature of the entry or amendment may require, or the court, from which the appeal has been or shall be made, would have rendered if such entry or amendment had been made before the rendition of the judgment in such inferior court."

They contended, that this act did not embrace the judgment before the court, it having been rendered on the *inquisition* of a jury, and not on a *verdict*; and to show the distinction between an *inquisition* and a *verdict*, they referred to the statutes, 32 *Hen. VIII. ch. 30*, and 18 *Eliz. ch. 14*, cited in 1 *Bac. Ab.* 91, 92. *Ireland's case*, *Cro. Eliz.* 339. *Countier vs. Barret*, *Ibid* 412. *Cannon vs. Abbot*, 1 *Lev.* 210. 5 *Com. Dig.* tit. *Pleader*, 157. The act of 1794, *ch. 46*; and 10 *Coke*, 126.

*Harper and W. Dorsey*, in support of the rule, referred to the acts of 1794, *ch. 46*, and 1785, *ch. 80, s. 13*. 3 *Blk. Com.* 397, 393. *Jacob's L. D.* tit. *Inquest*, 454, *Ibid* tit. *Judgment*, 552. *Ibid* tit. *Ventre, &c.* *System of Plead.* 514; and *Co. Litt.* 169, a. They also contended, that in the *third section* of the act of 1811, *ch. 161*, the expressions "that no judgment shall be reversed because the verdict was rendered *and* the judgment entered, &c." might be construed, *or* the judgment, &c.

CHASE, Ch. J. delivered the opinion of the court, making the rule absolute. He said the court considered that

the acts of 1809, *ch.* 153, and 1811, *ch.* 161, authorised the court to permit the entry to be made.

BUCHANAN, J. dissented.

RULE MADE ABSOLUTE.

The appellee then entered his release of the sum of \$2227 06 $\frac{2}{3}$ , parcel of the sum found and returned for his damages by the inquisition, being so much of the damages as exceeded the sum of £5000 current money, the damages laid in the declaration; and prayed that the release be entered on the records of this court; that the transcript of the record be amended according to such release and entry; and that judgment be entered for the sum of \$13,333 33 $\frac{1}{3}$ , being the residue of the damages so found and returned with costs, &c.

*Key* and *Shaaff*, for the Appellant, then contended, that by the record it appeared that the jury were improperly charged to inquire of the damages sustained by the plaintiff, omitting *and costs*, as required by the act of 1794, *ch.* 46, and the inquiry was not stated to be on motion of the plaintiff. 2 *Harr. Ent.* 121, (a).

*Harper* and *W. Dorsey*, for the Appellee stated, that as there seemed to be some informality in the record, they suggested diminution; and a writ of diminution being granted, the record was returned, as herein before stated.

At this term, (May term 1815,) the cause was argued before CHASE, Ch. J. and BUCHANAN, and MARTIN, J.

*Pinkney*, *Key* and *Shaaff*, for the Appellant, contended, that the court below erred in giving judgment against the defendant while there was an outstanding plea, and issue undisposed of. That the last plea was not a plea *puis darrein continuance*, but was a second plea in bar. That the fact pleaded in the second plea did not happen after the last continuance, nor does that plea conclude as a plea *puis darrein continuance*; and not being such a plea, but simply a further plea under the statute of *Ann*, the first plea was not waived. To show that it was not in the form of a plea *puis darrein continuance*, they referred to 2 *Harr. Ent.* 550, where the former plea is relinquished, and the

(a) See *Kierstead vs. Rogers & Garland*, 6 *Harr. & Johns.* 282.

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fact had happened after the last continuance, and the conclusion of the plea is different from the present. They contended, 1. That every plea of *puis darrein continuance* must be verified by affidavit. *Martin vs. Wyvill*, 1 *Str.* 493. 2. That this plea was not pleaded as a plea *puis darrein continuance*, because in conclusion it strikes at the action itself, and not at its further continuance. 3. That in a plea of *puis darrein continuance*, the fact pleaded must have happened since the last continuance. They referred to 5 *Bac. Ab. tit. Pleas & Pleadings*, (Q) 477. 2 *Lill. Pr. Reg.* 326. That here the fact happened at October term 1797, and was pleaded at May term 1798. That this was a plea under the statute of *Ann*, and could be added at any time without leave of the court. They cited 5 *Com. Dig. tit. Pleader*, 68, 223. *Ryley vs. Parhurst*, 1 *Wils.* 219. *Waters vs. Bovell*, *Ibid* 223.

*Harper*, for the Appellee, contended, that the statute of *Ann* does not give the defendant leave to plead a second or other plea, after he has selected his defence. That after issue was joined he could plead only *puis darrein continuance*. He cited 5 *Bac. Ab. tit. Pleas, &c.* 121. He also contended, that although the plea was not in all its form in the nature of a plea *puis darrein continuance*, yet it was in substance such a plea. It was once so considered by the defendant's counsel, and when the demurrer was ruled good, they applied for leave to plead the general issue. This they would not have applied for if they had considered there was an outstanding plea subsisting in the case. That it is a plea *puis darrein continuance*, he referred to *Bull. N. P.* 309. *Barber vs. Palmer*, 1 *Salk.* 178. *Anonymous*, *Cro. Eliz.* 49. 3 *Blk. Com.* 316. 1 *Chitty's Plead.* 436, and 2 *Chitty's Plead.* 676, 677.

By consent of the parties, who entered into terms,

JUDGMENT REVERSED.

MAY.

COCKEY, et al. Lessee vs. SMITH.

The defendant in an action of ejectment, having read in evidence a grant of the land in dispute to M G in 1708, proved that T F was in possession of part of the land from 1765 to the time of his death, and that those claiming under him had been in possession ever since, and that the defendant was the only heir of T. F. He then, without showing any title or possession in J C, offered to read in evidence a deed for said land from J C to T F in 1765, for the purpose of proving in what manner and at what time T F came into possession of the land. *Held*, that for such a purpose the deed might be read in evidence.

APPEAL from Baltimore County Court, from a judgment obtained by the defendant in that court, (now appellee,)

in an action of ejectment, having read in evidence a grant of the land in dispute to M G in 1708, proved that T F was in possession of part of the land from 1765 to the time of his death, and that those claiming under him had been in possession ever since, and that the defendant was the only heir of T. F. He then, without showing any title or possession in J C, offered to read in evidence a deed for said land from J C to T F in 1765, for the purpose of proving in what manner and at what time T F came into possession of the land. *Held*, that for such a purpose the deed might be read in evidence.

in an action of ejectment to recover a tract of land called *Franklin's Neglect and Cockey's Discovery*. Defence was taken on warrant, and plots were made. The plaintiff at the trial read in evidence a patent for *Franklin's Neglect and Cockey's Discovery*, granted to *John Cockey* the 23d of April 1803. And gave in evidence, that the same was truly located by him on the plots. It was admitted, that since the institution of this suit *John Cockey*, the patentee, died, and that the parties, made since his death, were his devisees and legal representatives. The defendant then read in evidence two patents, one for *Gibson's Forest*, granted to *Miles Gibson* the 5d of April 1708, and the other for *Warner's Chance*, granted to *John Warner* the 3d of March 1711. And proved that she had truly located these tracts on the plots. She further gave in evidence, that *Thomas Franklin* was possessed of part of these lands from about the year 1765, until the time of his death, and that those claiming under him had been in possession of them until the present time; and that she the defendant was the only heir and representative of said *Franklin*. The defendant then, without having produced or offered any evidence that *John Clarke* had derived any title from the alleged patentees of *Gibson's Forest* and *Warner's Chance*, or that *Clarke* ever had been in possession of said two tracts of land, or any part thereof, offered to read in evidence a deed from *Clarke* to *Franklin* for the said two tracts of land, dated the 2d of August 1765, for the purpose of proving in what manner and at what time *Franklin* came into possession of said lands. To the reading this deed in evidence the plaintiff objected. And the Court, [*Nicholson*, Ch. J.] overruled the objection, and permitted the deed to be given in evidence for the purposes aforesaid. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before BUCHANAN, EARLE, JOHNSON, and MARTIN, J. by

*Winder*, for the Appellant; and by  
*Pinkney*, for the Appellee.

JUDGMENT AFFIRMED.

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MAY.

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STEVENSON VS. HOWARD, SURV. OF PENNINGTON'S LESSEE.

APPEAL from *Baltimore County Court*. This was an action of ejectment, brought on the 21st of September 1808, for part of a tract of land called *Salisbury Plains*, described by metes and bounds, on a joint demise for the whole of such part by *J. E. Howard* and *J. Pennington*, and on separate demises by each of them, for an undivided moiety of said part. The defendant, (now appellant,) took defence on warrant, and plots were made. The death of *Pennington*, one of the lessors of the plaintiff, was suggested after the issue was joined. At the trial the plaintiff gave in evidence a patent for *Salisbury Plains*, granted to *Thomas Pert* and *Robert Bengier* on the 10th of July 1671, and that he had truly located the same on the plots in this cause. He also gave in evidence, that *Thomas Rutter*, (the first,) was seized and possessed of *Salisbury Plains*, and died so seized in 1746, having by his will, dated the 26th of September 1744, devised to his son *Thomas Rutter*, in tail, after his mother's death, all the remainder part of *Salisbury Plains*. He also gave in evidence, that *Thomas Rutter*, (the second,) the son of the said devisor, entered in possession of that part of *Salisbury Plains* devised to him by the said will; and so being possessed thereof did, on the 23d of February 1780, convey a part of his said part of *Salisbury Plains* to *Benjamin Griffith*, containing a lot of near four acres, &c. And also gave in evidence, that the location of the said deed, by the plaintiff on the plots, was correct. He further gave in evidence a deed from *Ann Griffith*, daughter of *Benjamin Griffith*, to *John Eager Howard*, one of the lessors of the plaintiff, dated the 2d of September 1801, for all her right, &c. in the same land conveyed to her father by *Thomas Rutter*. That *Benjamin Griffith* died intestate on or about the year 1800, leaving six legitimate children, who are now living, one of whom was the said *Ann Griffith*. He also gave in evidence a deed from *John E. Howard*, to *Josius Pennington*, the other lessor of the plaintiff, dated the 25th of November 1801, for one moiety or undivided half part of part of *Salisbury Plains*, stated to have been conveyed to the said *Howard*, by *Thomas W. Griffith*, on the 28th of October 1801, and which was conveyed to *Benjamin Griffith* by *Thomas Rutter* on the 23d of February

In an action of ejectment on the joint demise of J. Howard and J. P., to the plaintiff, for a part of a tract of land, and on separate demises by each of them, for an undivided moiety of such part, the death of J. P. was suggested after the issue was joined, and a verdict was rendered for the plaintiff for one undivided twelfth part of the tract, described by lines on the plots. A motion in arrest of judgment was overruled, and judgment entered on the verdict for the plaintiff.

The plaintiff in deducing his title to the land in question, gave in evidence a grant for the land in 1671 to T. P. and R. B., and that T. R. was seized and possessed of the land, and died so seized in 1746, having by his will in 1744, devised the land in tail to his son F. R. after his mother's death. F. R. in 1780, being in possession, conveyed the land to B. G., who died intestate in 1800, leaving six children, one of whom conveyed all his interest to the lessor of the plaintiff. Held, that the life estate set up to defeat the action, must, from the length of time that had elapsed (1746 to 1803,) be considered as having expired before the ejectment was brought, and that the plaintiff was entitled to recover.

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1780. The defendant then prayed the court for their direction to the jury, that the plaintiff had not made title to the land mentioned in the declaration, or any part thereof, so as to entitle him to recover. This direction and opinion the Court, [*Nicholson*, Ch. J. and *Hollingsworth*, A. J.] refused to give. The defendant excepted. Verdict for the plaintiff for one undivided twelfth part of all that part of *Salisbury Plains* which is included in the following lines:—Beginning, &c. The defendant moved the court in arrest of judgment, and assigned the following reasons:

1. That the jury were sworn to try the issue joined between *Jacob Goodtitle*, (who claims by a joint demise from *John E. Howard* and *Josias Pennington*, for the whole land mentioned in the declaration,) and the defendant, and the verdict was for an undivided twelfth part of said land. 2. That the jury were sworn to try the issue joined between *Jacob Goodtitle*, (who claims under a several demise from *John E. Howard* and *Josias Pennington*, for one undivided moiety by each of them of the land mentioned in the declaration,) and the defendant, and there was a general verdict for an undivided twelfth part. 3. That the jury were sworn to try the issues between *Jacob Goodtitle*, (who claims under a joint and several demise from *John E. Howard* and *Josias Pennington*,) and the defendant. That the death of *Josias Pennington* was suggested, and admitted on the record, and there was a general verdict without specifying under what issue the jury found. 4. That the verdict was not sufficiently certain for the court to render a judgment upon it. 5. That there were various uncertainties and contradictions, by reason of which no judgment could be entered. The county court overruled the motion, and entered judgment on the verdict for the plaintiff, and the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

*Martin* and *Winder*, for the Appellant. 1. The verdict does not state on which of the counts in the declaration it was found; and as there were several counts, two of them on the demises of several lessors, the verdict not describing under which count it was found, was so uncertain that no judgment could be entered on it.

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2. By the will of *T. Rutter* a life-estate was given to his wife, and there was no proof at the trial that she was dead, or that she had conveyed away her life-estate to the lessors of the plaintiff, or those under whom they claimed. In the devise to the son, after his mother's death, there is no description of what part of the tract was devised to him. The son could not convey such an estate as would enable the plaintiff to recover, as it shall be intended that the devisee for life was alive, unless the contrary is shown. 12 *Vin. Ab. tit. Evidence*, 124. a. b. 56. Nor was the deed from *T. W. Griffith* to *J. E. Howard*, recited in the one from *Howard* to *Pennington*, offered in evidence. *B. Griffith* having died intestate, leaving six children, his real estate descended to the whole of them under the act of 1786, *ch. 45*, and no one of the children had any right to the land, unless allotted to such child under that act. Whether an action of ejectment can be brought by any one of them, or by any person claiming under any such child, is a question not decided.

*Harper*, for the Appellee. 1. No other verdict could be given. But if it be erroneous, it is cured by the act of 1809, *ch. 153*, s 2, which provides, that if there is one good count to which the evidence will apply, and there is a general verdict, it is to be supposed the verdict meant to apply to that count.

2. The question respecting the devisee for life was not set up or thought of in the court below; if it had it could have been easily proved that she was dead. The devise was to her in 1744, when she was at least 25 years of age, having been married, and was the mother of four children, as appears by the will. If she had been living at the trial, she would have been upwards of 90 years of age. She must therefore, from the length of time, be presumed to be dead.

THE COURT affirmed the judgment of the County Court. On the second point raised, they said that the life-estate, set up to defeat the action, from the length of time that had elapsed before the suit was brought, must be considered as having expired before the ejectment was brought.

JUDGMENT AFFIRMED.

## HANEY VS. WADDLE.

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**APPEAL** from *Baltimore County Court*. This was a petition for freedom. At the trial the petitioner, (now appellee,) produced a witness, who proved that *John Haney*, the brother of the defendant, (now appellant,) wrote a letter to him from *St. Mary's* county in this state, where he resided, and sent it by the petitioner, who was then living in *Virginia*, where he was born and raised, and by whom it was delivered to the witness in the city of *Baltimore*, where the witness resided, sometime in the month of February 1810, and shortly after the said letter was written. The letter contained a request that the witness would keep the petitioner until he, *John Haney*, or his brother *Samuel Haney*, should arrive in *Baltimore*; and it also stated, that the petitioner was the property of his said brother, who was under age, and that he was the guardian of his said brother. That accordingly the witness did keep the petitioner in his service from that time for about two months and an half, when the defendant arrived in *Baltimore* from *St. Mary's* county, where he was bound in 1803 by his father, for seven years, to learn the business of a pilot, and where he then lived. That the defendant then called on the witness, and received the hire for the time the petitioner had been with the witness. That the defendant left the petitioner with *Robert Long*, his brother-in-law, who resided in *Baltimore*, and who some short time afterwards hired the petitioner to *Joseph Nevitt*, the captain and owner of the *Alexandria* packet, which sailed between *Alexandria* and *Baltimore*; that the said packet was licensed at the port of *Alexandria*, and the captain and owner resided and lived in *Alexandria*. That sometime after the petitioner was so hired to *Nevitt*, he met with the defendant at *Baltimore*, who agreed that he, *Nevitt*, might keep the petitioner in his hire and service until the 17th of December 1810, and longer if he chose. That in consequence thereof *Nevitt* did keep the petitioner in his service until the 17th of December 1810, when being with him in his packet at *Baltimore*, he deserted and run away from him, and shortly after filed this petition for his freedom. The petitioner further proved, that he was born and raised in the state of *Virginia*, and was brought into this state from the state of *Virginia* in the manner herein before stated.

A minor can do no act to affect his rights, nor can his rights be affected by an act of his guardian. The guardian of a minor importing into this state, contrary to law, a slave belonging to the minor, will not entitle such slave to freedom; nor will the assent of the minor, during his minority, give such title.

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The defendant then proved, that the petitioner was born the slave of the defendant's father, and was given to the defendant by his father, who always has resided, and still resides, in the state of *Virginia*. That the defendant arrived at the age of 21 years on the 13th of December 1810, at which time his apprenticeship expired; and has since followed his business as a pilot in the waters of the *Chesapeake Bay*, and was sometimes at *Norfolk*, sometimes at *Alexandria*, sometimes at *St. Mary's*, and sometimes at *Baltimore*, just as his business called him; was an unmarried man, and had no fixed place of residence. He then prayed the court to direct the jury, that if they believed the foregoing testimony, the petitioner was not entitled to recover. But the Court, [*Nicholson*, Ch. J.] was of opinion, and so directed the jury, that if they believed that the petitioner was born and raised in the state of *Virginia*, and continued to reside there until the month of February 1810. that he was then sent by the defendant, or with his consent and approbation, to *Baltimore*, to be hired, that he was so hired and resided in *Baltimore*, and that the defendant himself was not a resident of this state, and did not move into this state for the purpose of residing here, that the circumstance of the defendant's being under the age of 21 years could not operate against the petitioner. That a minor had no other authority to import slaves into this state than an adult, and that neither the one nor the other had such authority, except in the special cases provided for in the several acts of assembly of this state, none of which embraced this case. The court therefore refused the defendant's prayer. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the case was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J. by

*Winder*, for the Appellant; and by

*W. Dorsey*, for the Appellee.

THE COURT dissented from the opinion of the County Court, on the ground that a minor could do no act to affect his rights, nor could his guardian for him. That the guardian of a minor importing a slave, did not entitle him to freedom, nor did the assent of the minor, during his minority, give such title.

JUDGMENT REVERSED.

JONES vs. THE STATE, use of ORR.

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JONES

vs.

The State

APPEAL from *Harford County Court* Debt on a sheriff's bond. The defendant, (now appellant,) pleaded general performance. The breach assigned in the replication was the voluntary escape of *W. T. Hall*, committed under an execution at the suit of *T. Orr*, at whose instance and for whose use this action was brought. *Rejoinder*, that *Hall* was retaken, &c. and was in custody when the writ in this cause issued. That the escape was without the knowledge, &c. of the sheriff. *Traverse*, voluntary permission to escape, &c. *Surrejoinder*, that *Hall* was not retaken, and did not remain in custody; that the escape was voluntary and wilful. *Rebutter*, that *Hall* did escape without the knowledge, &c. of the sheriff. Issue joined.

At the trial the plaintiff prayed the opinion of the court, and their direction to the jury, that if the jury believed that the sheriff appointed the dwelling-house of *Walter T. Hall* as his prison, and that *Hall* was there confined, and that his dwelling-house was not part of the public gaol and prison of *Harford* county, and was not within the prison walls and prison bounds of the said gaol, that then there was proof of a voluntary escape. Of this opinion the Court, [*Hollingsworth, A. J.*] was, and so directed the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the cause was argued at December term 1813, before CHASE, Ch. J. and BUCHANAN, NICHOLSON, EARLE, and JOHNSON, J.

*Martin and Kell*, for the Appellant. The question is, whether a sheriff can permit a person, committed to his custody under a *ca. sa.* to be confined in any place but the public gaol of the county? They contended, that the commitment of a debtor in execution, being to the custody of the sheriff, and not to the county gaol, or any particular prison, it follows that the sheriff must fix upon the place of confinement within his bailiwick. The law has not provided that any other person shall do it, nor does it declare the county gaol to be the place for such confinement. Suppose there be no gaol in the county, or that it be insecure, of which the sheriff must judge, shall he not confine elsewhere? The opinion of the court below is in effect, that if a sheriff makes a debtor's house his prison, and there keeps him confined, yet the sheriff is guilty of an escape.

In an action on a sheriff's bond for a voluntary escape of a debtor committed to the custody of the sheriff under an execution—Held, that if the sheriff appointed the dwelling-house of the debtor as his prison, and the debtor was there confined, and his dwelling-house was not part of the public gaol and prison of the county, and was not within the prison walls and prison bounds of the gaol, there was proof of a voluntary escape.

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They cited *Imp. Off. Shff.* 43, 67, 68, 147, 215. *Boyston's Case*, 3 *Coke*, 44. 1 *And.* 345. *Latch's Rep.* 16. 6 *Bac. Ab.* tit. *Sheriff*, (H 5,) 158. *Husband vs. Cole*, 1 *Sid.* 318. *Dalton*, 143. *Rigewie's case*, 3 *Coke*, 52. *Gill.* 80, 85. *Dalton*, 139. *Imp.* 220. *Bonafous vs. Walker*, 2 *T. R.* 126. *Balden vs. Temple*, *Hob.* 202. No injury can be sustained if the person is *confined*; and from the authority referred to in *Latch*, "confinement is the whole of the debtor's punishment, and of the creditor's satisfaction." Here it appears that the party never was out of *confinement*. It would then surely be a very rigid construction to make the sheriff guilty of an escape, and is opposed by the authorities referred to. Such a decision can be only authorised upon the principle that he *must* confine prisoners for debt in the county gaol, and that is in direct opposition to the authorities cited.

*Montgomery*, (Attorney General,) and *Harper*, for the Appellee, referred to the stat. 32 *Geo. II.* ch. 22. 1 *Backus's Shff.* 152. The acts of November 1773, ch. 6, s. 11; November 1781, ch. 10, s. 5; and 1786, ch. 24, s. 5. 2 *Bac. Ab.* tit. *Escape in Civil Cases*, (B). 3 *Blk. Com.* 415. 3 *Com. Dig.* 492, 108. *Ravenscroft vs. Eyles*, 2 *Wils.* 294. *Balden vs. Temple*, *Hob.* 202; and *Sheriff of Essex's case*, *Ibid* 202.

*Curia adv. vult.*

At this term,

JUDGMENT AFFIRMED.

MAY.

KERR, *et al.* vs. THE STATE, use of THE LEVY COURT, &c.

In an action on the bond of a supervisor of public roads, wherein, there being no pleadings, a case was stated for the court's opinion, upon which the county court gave judgment for the plaintiff. On appeal, reversed. 1. Because the authority of the levy court was a special one, and had not been strictly pursued by them in making the appointment of a supervisor on the day directed by the act of assembly of 1801, ch 77. 2

APPEAL from *Baltimore County Court*. Debt on the following bond: "Know all men by these presents, that we, *William Kerr, William Jones, Charles Griffin, Richard Ridgely, Esquire*, and *William Booth*, all of *Baltimore county*, in the state of *Maryland*, are held and firmly bound unto the state of *Maryland*, in the sum of five thousand dollars current money of the *United States*, to be paid to the said state; to the which payment, well and truly to be made and done, we bind ourselves, our and every of our heirs, executors and administrators, in the whole and for the whole, jointly and severally, firmly by these presents.

Because there was no replication setting forth the breaches.

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Sealed with our seals, and dated this third day of October one thousand eight hundred and four. Now the condition of the above obligation is such, that if the above bound *William Kerr* shall perform all the duties required of him as supervisor of the turnpike roads in *Baltimore* county agreeably to the directions of an act of assembly, entitled, "An act to repeal an act, entitled, An act to lay out several turnpike roads in *Baltimore* county, and the several supplements thereto, and for other purposes," then the above obligation to be void, else to be and remain in full force and virtue in law." There were no pleadings in the case, and a judgment was confessed by the defendants, subject to the opinion of the court, whether under the acts of assembly under which the bond purports to be taken, or otherwise, the action could be sustained by the plaintiff. The following statement of facts was afterwards agreed to: The office of supervisor of the turnpike roads in *Baltimore* county, being vacant by the resignation of the supervisor previously appointed, *William Kerr*, (one of the defendants,) was appointed such supervisor, by the levy court of said county, on the 3d of October 1804, to fill said office, and duly qualified as such; and in consequence of said appointment *Kerr*, on the same day, entered into the bond on which this suit is instituted, with *William Jones*, &c. (the other defendants,) as his securities. To enable *Kerr* to perform the duties of such supervisor, he received the tolls collected on the said roads, which are appropriated by the act of 1801, *ch* 77, to the making and repairing said roads, and were to be so disbursed and expended agreeably to the provisions of the said act, under the authority and direction of the levy court; and for the like purpose he applied to and received from the levy court orders for money on the county collector of the tax, levied for making and repairing said roads, and agreeably thereto received the amount of them from said collector. Upon a settlement of his accounts and transactions, as supervisor aforesaid, for the second year of his being supervisor, on the 1st of October 1806, at which time he resigned his office, there remained of the monies received by him, unexpended and unaccounted for, the sum of \$2773 05, for the recovery of which this suit was brought. *Kerr* settled an account as supervisor with the said court for the first year of his acting as supervisor, on the 1st of October 1805, and account-

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ed for all monies which had been previously received by him as supervisor, by showing the rightful expenditure of the same. He was allowed by said court, in his first settlement, for his services for the first year as supervisor, the sum of \$750, and refused to act any longer unless they could allow him a greater sum for the future, and the sum of \$800 was allowed to him accordingly by said court, in his last settlement for his services as supervisor for the second year. The sum above mentioned which remained in the hands of *Kerr*, might have been laid out and expended by him as supervisor. At the time of the resignation of *Kerr*, there was due and unpaid to sundry persons the sum of \$900, for provisions and other necessary articles furnished to him as supervisor, which sum the levy court paid to the persons to whom it was due after the resignation of *Kerr*. The sums which the levy court paid after *Kerr's* resignation, for articles furnished him as above stated, and also all such sums as he may have paid or settled as supervisor before or after his resignation, it was agreed should be accurately ascertained by *W. H. Winder* and *T. B. Dorsey*, &c. The question submitted to the court was, whether the sureties of *Kerr* were answerable on the said bond? The county court gave judgment for the plaintiff. From that judgment the defendants appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

*Martin* and *Winder*, for the Appellants. 1. The declaration is a joint one against all the obligors, as defendants, and the breach assigned therein is that they had not paid the penalty of the bond, when it ought to have been stated that neither the defendants, nor either of them, had paid. The bond is joint and several, and a payment may have been made differently from that which the breach in the declaration alleged. 2. The court below, under the agreement of the parties, could enter no judgment except for the sum which should be ascertained to be due by the persons appointed for that purpose. 3. The levy court had no authority to take the bond. The act of 1801, *ch. 77, s. 2*, directs "that the justices of the levy court of *Baltimore* county shall meet at the court-house of said county on the *second Monday in February next, after the passage of this act*, and shall proceed to appoint a fit and

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proper person as supervisor of the turnpike roads in *Baltimore* county, who shall, before he acts as such, give bond," &c. "and the said supervisor shall, before he acts as such, take the following oath before some one of the justices of the levy court, to wit," &c. The act gives no authority to make any appointment of a supervisor, except on the second Monday in February next after the passage of the act. The statement does not show that the levy court did meet at the time and place mentioned in the law, and make the appointment of supervisor. Although there had been a previous appointment, (which is not stated to have been regularly made,) and the person appointed had resigned, the law gives no authority to the levy court to meet at any other time, and make a new appointment. Where a special authority is delegated, it must be strictly pursued. Here the appointment of *Kerr* having been made on the 3d of October 1804, was not a legal appointment, and the bond by him given under that appointment is void, and the sureties therein are not answerable. They could be answerable only where the appointment was made in conformity to the law. That a special authority must be strictly pursued, they referred to *Flannagan's Lessee vs. Young, 2 Harr. & M. Han. 42*, (argument of *J. T. Chase*.)

4. The statement does not show how the oath of the supervisor was taken, if it was taken at all. It was necessary to his sureties that he should take the oath prescribed by the law, as it was a great security to them that he would discharge his duties faithfully.

5. The repayment of money placed in the hands of the supervisor, was not one of the duties covered by the bond, and for which his sureties were liable. By the 14 section of the act of 1801, *ch. 77*, the supervisor appointed in virtue of that act, should, on or before the first Tuesday of October annually, settle his accounts on oath, with the levy court, &c. and when passed by that court the same shall be lodged in the clerk's office, &c. But there is nothing in said act about paying over any balance which may be due from him. No neglect is stated to have taken place in *Kerr*, and the repayment of money placed in his hands was no part of his duty. If money unexpended remained in his hands, when he resigned he was bound to pay it over to some one; but he was guilty of no violation of his duty in not paying it over until he was called on and had refused to pay it over to

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the new supervisor, if the law justified such appointment. But until there had been such appointment and neglect to pay to the new supervisor, no suit could be brought against him. There could be no breach until he was called upon by some one properly authorised to receive, and he had refused to pay *African Company vs. Mason*, 10 Mod. 227. To show that the bond of the collector of a tax, which had not been laid at the time prescribed by law, was void, and the sureties therein were not liable, they referred to *Quynn vs. The State*, use *Pue et al.* 1 Harr. & Johns. 36.

No Counsel argued for the Appellee.

THE COURT reversed the judgment of the County Court on two grounds—1. There was a special authority delegated which had not been strictly pursued by the levy court in making the appointment of a supervisor on the day directed by the act of assembly. 2. There was no replication setting forth the breaches.

JUDGMENT REVERSED.

MAY.

FULTON VS LEWIS.

J L. a married man, a native of *St. Domingo*, flying from the dangers which existed there, removed into this state in 1793, bringing with him three negroes, whom he had before and then owned as slaves. In 1794 he sold one of them as a slave, to W C, who sold him to R F. J L continued to reside in this state until 1796, when he returned to the *West Indies*. The negro thus sold petitioned for his freedom against R F—Held, that he was entitled to freedom.

APPEAL from the Court of Oyer and Terminer, &c. for *Baltimore* county. This was a petition for freedom, and the general issue pleaded.

At the trial the following facts were admitted in evidence: *John Levant*, a married man, being a native and resident of the Island of *Saint Domingo*, removed from that place in July 1793, flying from disturbances which then existed there, endangering the lives and property of the inhabitants, and brought with him into this state three negroes, of whom the petitioner, (now appellee,) is one, whom he then and before owned as a slave. That in May 1794, he sold the petitioner, as a slave, to *William Clemm*, who sold him as such to the defendant, (the appellant.) That said *Levant* arrived at *Baltimore* in August 1793, and continued to reside there until sometime in 1796, when he returned to the *West Indies*. The defendant thereupon prayed the direction of the court to the jury, that if they believed the facts, the petitioner was not entitled to his free-

dom. This opinion the Court, [Scott, Ch. J.] refused to give; but directed the jury, that upon these facts the petitioner was free. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the case was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, EARLE, JOHNSON, and MARTIN, J.

Glenn, for the Appellant, contended that the act of 1783, ch. 23, under which the petitioner claimed his freedom, meant only a *voluntary importation* of slaves, and not an importation arising from absolute necessity, produced by causes over which the owner, as in this case, had and could have no control. He referred to *De Kerlegand vs. Negro Hector*, 3 Hurr. & M'Hea. 185, and the act of 1792, ch. 56.

Montgomery, (Attorney-General,) Jennings and Scott, for the Appellee.

JUDGMENT AFFIRMED.

### WALES VS. WALLING.

MAY.

APPEAL from Frederick County Court. This was an action of debt for \$75. The declaration stated, that the defendant, (now appellee,) on the 29th of August 1808, at, &c. by his certain writing obligatory, acknowledged himself to be held and firmly bound unto the plaintiff, (now appellant,) in the aforesaid sum of seventy-five dollars, to be paid to him the plaintiff when he should be thereunto required, &c. The oyer given of the writing obligatory on the defendant's prayer, is as follows: "For value received, I do promise to deliver unto Mr. Roger Wales, on or before the first day of April 1809, one horse, to be valued by two judicious men at seventy-five dollars current money of the United States; and in case of a disagreement in the persons so appointed to appraise said horse, I do hereby hold myself firmly bound and indebted to the said Roger Wales, or assigns, in the sum of seventy-five dollars current money." It was signed and sealed on the 29th of August 1808, by the defendant. The defendant demurred specially to the declaration, and assigned the following causes of demurrer.

1. Because the writing obligatory, whereof the plaintiff hath given oyer, varies from the writing obligatory set forth in the declaration.

J W, by his note under seal, promised to deliver to R W, on or before, &c. a horse, to be valued by two judicious men at \$75, and in case of a disagreement in the persons so appointed to appraise said horse, he held himself bound and indebted to R W in the sum of \$75. On this note R W brought an action of debt for \$75, against J W, and declared on the note as if it had been given expressly for that sum of money. J W, after having had oyer of the note, demurred specially to the declaration, assigning for causes a variance between the note and that set forth in the declaration; that there was no agreement that J W did not deliver the horse to be valued, nor a disagreement of the persons to have been appointed to appraise the horse, nor a demand of or refusal by J W to deliver such horse. Demurrer ruled good.

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2. Because the plaintiff hath not set forth in his declaration that the defendant did, on or before the 1st day of April 1809, refuse to deliver to the plaintiff a horse, to be valued according to the terms of the said writing obligatory.

3. Because the plaintiff in his said declaration hath not averred a disagreement of the persons to have been appointed to appraise such horse, nor has he averred any demand of or refusal by the defendant to deliver such horse as mentioned in said agreement, so as to entitle him the plaintiff to sue for the sum of \$75, mentioned in the writing obligatory.

4. Because the said declaration is uncertain, and wants form. The plaintiff joined in demurrer. Judgment upon the demurrer was given by the county court for the defendant. From that judgment the plaintiff appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, EARLE, JOHNSON, and MARTIN, J.

*Ross*, for the Appellant. Whenever it is *essential to the cause of action*, that the plaintiff should have requested the defendant to perform his contract, such request must be stated in the declaration, and proved. 1 *Chitty's Pleadings*, 322. The converse of the above positions is equally true. The instrument of writing, upon which this suit was brought, creates a debt immediately, to be paid at a subsequent day, to wit, the 1st of April 1809. The plaintiff's *cause of action* commenced with the writing obligatory, to wit, the 29th of August 1808, but its legal demand was suspended until the 1st of April 1809, therefore it was not essential to the plaintiff's cause of action to set forth that the defendant did, on or before the 1st of April 1809, refuse to deliver to the plaintiff a horse, &c. for before that period arrived there was a debt due, or a cause of action in the plaintiff, liable to be defeated by the defendant's delivery of a horse, according to the terms of the writing obligatory; but the plaintiff's *cause of action* did not arise from the nonperformance of the contract by the defendant, for the plaintiff had a vested interest from the date of the writing obligatory. The delivery of the horse, &c. was a proviso or condition, inserted in the writing obligatory, for the benefit of the defendant, with all the requisites of which

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he was bound at his peril to comply. *Lamb's Case*, 3 *Coke*, 23. *More & Baker vs. Morecomb*, *Cro. Eliz.* 864. *Studholme vs. Mandell*, 1 *Ld. Raym.* 279. The proviso or condition, when performed, or an offer and readiness to perform, would have operated as a defeasance to the plaintiff's action, and as matter of defence, should have been shown by the defendant, and need not be stated in the plaintiff's declaration. 1 *Chitty's Pleadings*, 228, 229. In debt, on a bond with condition, the plaintiff may declare generally, and it is on the defendant's part to show the condition, which goes by way of defeasance, &c. 3 *Bac. Ab.* 714. If an interest passeth presently and vests, and is to be defeated by matter *ex post facto*, or condition subsequent, be the condition or act to be performed by the plaintiff or defendant, the plaintiff may declare generally without showing the performance, and it shall be pleaded by him who shall take advantage of the condition, &c. *Ughbred's case*, 7 *Coke*, 10. In the case now before the court, there was an interest vested in the plaintiff, upon the execution of the writing obligatory, to be defeated by an *ex post facto* act to be performed by the defendant, to wit, the delivery of a horse, &c. on the 1st of April 1809, and if delivered according to the terms of the writing obligatory, should have been pleaded by the defendant, for whose advantage the condition was made. It was not necessary for the plaintiff to aver "a disagreement of the persons to have been appointed to appraise said horse;" the appointment of the men was a duty incumbent on the defendant, as in *Lamb's case*, &c. and it would be a strange thing to require of the plaintiff to aver a disagreement of the men to appraise such horse, when no men were appointed, and no horse offered for the exercise of their judgment; for an averment of a disagreement of the persons, &c. would *ex vi termini* suppose that men were appointed, and a horse produced for their appraisement. A demand and refusal were equally unnecessary, the horse was not to be delivered until the 1st of April 1809, before that time no such demand could, consistent with the writing obligatory, be made, and after that period the plaintiff was not bound to accept of such horse, if offered by the defendant. In what the variance consists, as alleged in the first cause of demurrer, it would be difficult to conceive, had not the defendant's counsel said, in an action on the case on a special

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agreement, the plaintiff ought to state the agreement as it really was, though in the alternative. This position, (though determined otherwise by Lord Mansfield in *Layton vs. Pearce*, 1 Doug. 16,) may be admitted, yet there is no variance in this case, for this is an action of debt on a writing obligatory; and when a suit is brought on a deed, only so much need be averred as shows the plaintiff's cause of action. *Bristow vs. Wright*, 2 Doug. 667. A request laid in the declaration to pay the debt before it is due, is not material. *Frampton vs. Coulson*, 1 Wils. 33.

*Brooke*, for the Appellee.


JUDGMENT AFFIRMED.

MAY.

WEST VS. BEANES &amp; ODEN.

The court of Chancery will grant relief against a judgment rendered by confession, in an action at law, upon a promissory note given for a usurious consideration, on payment of the real sum due, with legal interest.

APPEAL from a decree of the Court of Chancery. The bill of the complainant, (now appellant,) stated, that on the 2d of February 1802, he borrowed of the defendant, *Beanes*, \$2500, at an interest at the rate of \$133 33 $\frac{1}{3}$  for every 60 days, for which \$2500 he gave his promissory note to *Beanes*, payable in six months; and also another promissory note for the payment of the interest, viz. \$400, payable as follow: \$133 $\frac{1}{3}$  at the end of 60 days, \$133 $\frac{1}{3}$  at the end of 120 days, and the balance at the end of 180 days. That the complainant continued to hold the said sum of \$2500, at the rate of interest above stated, until the 15th of March 1805, before which time he had paid to *Beanes* about \$800 as interest, at the rate aforesaid, on the \$2500, when the complainant and *Beanes* came to a settlement on account of the money so loaned, and the interest; at which settlement *Beanes* alleged that the complainant was indebted to him \$4100; and the complainant did then pass his notes to discharge the said balance, viz. one note for \$2050, payable in one year from the date to *E. H. Culvert*, or order, and the other for \$2050, payable in two years from the date, to *B. Oden*, or order, both of which were paid and delivered to *Beanes*, in satisfaction of the said balance; and that the consideration of the said two notes was the \$2500 so loaned, and the remainder of the sum therein mentioned, to wit, \$1600, was for the interest on the \$2500, at the rate aforesaid, remaining unpaid at the time of giving the said two notes. That *Beanes*,

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after the said two notes became due, caused suits to be brought thereon, one in the name of *B. Oden*, the other defendant, for the use of the said *Beanes*, and the other in the name of the said *Beanes* for the use of the *U. S.* and judgments were obtained against the complainant, which were removed to the court of appeals, and there affirmed. That the complainant cannot fully make out this case without a disclosure, on oath, from *Beanes*. *Prayer*, that he be compelled to answer certain interrogatories, &c. and that he account with the complainant for the money he received from him on the said loan beyond the legal rate of interest; and for other and further relief, &c. The bill also prayed for an injunction to stay proceedings at law on the judgment obtained in the name of *Oden*, for the use of *Beanes*, against the complainant, and for *subpena* against *Beanes* and *Oden*. The answer of *Beanes* admitted the suits and judgments, but did not admit that the debts arose entirely from the loans of money. It stated that one half of the money loaned on the 2d of February 1802, was advanced by *R. Marshall*, and the loan made at the equal risk of the defendant and *Marshall*, although the note was made payable to this defendant, who afterwards purchased *Marshall's* interest therein, and paid him a valuable consideration therefor, *Marshall* having previously received the profits or interest which had accrued on one half of the loan, and which were secured by different notes executed at different times to the defendant; the note for the \$2500 not expressing to carry any interest. That the defendant, after having had considerable other dealings with the complainant, came to a settlement with him on the 15th of March 1805, when the complainant was found indebted to the defendant, on account of all their dealings, \$4099 70; the original account of that settlement is filed, and to which he refers. One charge in that account is for the complainant's note of £247 4 1, being the price of a horse, and the amount of a note given by the complainant to one *Mackey*, which for a valuable consideration had been transferred to the defendant. He admitted that the \$2500 loaned, were loaned on the terms charged by the bill. He is unable to state what payments were made by the complainant for interest on the said loan, or the times when those payments were made. That the complainant was not obliged to resort to equity in order to obtain relief,

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(if ever entitled to any,) against the debts aforesaid, but was in possession of sufficient evidence to establish his defence *at law*; and he insists, that after having waived the defence at law, he ought not now to be permitted to rely upon that defence, or to resort to such proof in equity. He gave notice of a motion to dissolve the injunction; but the chancellor, on hearing the arguments of counsel, continued the injunction until final hearing. Commissions issued by consent, and testimony was taken. The answer of *Oden* stated, that he was ignorant of the transactions stated in the bill. The cause being argued by the counsel of the parties, was submitted for the decision of the Chancellor.

KILTY, Chancellor, (July Term 1811.) It appears that the note, on which the judgment at law was confessed, was given by *West* to *Oden*, for the purpose of his becoming eventually a security, and by him assigned to *Beanes*, who is the real defendant.

The chancellor has, since the argument, examined fully into the subject, in which a very important principle is involved, as it regards the practice in general, as well as this case. From the nature of the transaction, he was disposed to grant relief if it could have been done, but he is of opinion that it could not be granted consistently with the established principles of courts of equity. The confession of a judgment, without any surprise or fraud in the manner of its being obtained, must be considered as effectual as if the right had been determined by a verdict; because it is to be presumed that the claim would have been prosecuted to trial, if the judgment had not been confessed; and the complainant, having waived his defence at law, which for aught that appears to the contrary, he might have used, cannot now be relieved by this court.

It was urged by one of the counsel in the argument, and strongly relied on, that the defence at law was different from that in equity; and that a defendant might be unwilling to defeat the whole claim by a plea of usury, and yet disposed to avoid the payment of all above the legal interest.

Admitting the correctness of this sentiment in the transactions of individuals, it is not one of which the law can take notice as a ground for its decisions.

The greater always contains the less; a defendant, after getting clear of a suit by such a plea, might satisfy his

own conscience by paying or tendering what he might think justly due; but the desire of doing so cannot be received as a reason for not making the full defence at law, and cannot constitute the other a separate and distinct defence.

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While the chancellor considers that he is not at liberty to depart from the established rules, and the sanction that has been given to the verdict of a jury, or the confession of a judgment, it must be admitted that the cases in which courts of equity have interfered, have in substance come very near to the present case, and have not been attended with greater hardship. *Decreed*, that the injunction be, after the 21st of the present month, dissolved without further application or order, and the bill dismissed, but without costs. From this decree the complainant appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, and MARTIN, J.

*Martin, Pinkney, Key and Shaaff*, for the Appellant, stated the question to be, whether after a confession of judgment upon a usurious consideration the party could be relieved in equity? They contended that the court of chancery could relieve against a judgment confessed, as well as in other cases; but admitted that such relief could not be had where a jury have given a verdict upon the very point upon which relief is prayed. They referred to *Steuart and Maddox vs. Martin*, where the same point came before the chancellor in 1807, and in which he decreed differently from his present decree. As to the doctrine of the courts of chancery in *Great Britain and Ireland*, upon a similar question, they referred to 7 *Bac. Ab. tit. Usury*, (G) 203. 22 *Vin. Ab. tit. Usury*, (Q) 314, pl. 1. *Langford vs. Barnard*, *Toth.* 231. *Bosanquet vs. Dashwood*, *Ca. temp. Talb.* 38. *Ord on Usury*, 93. *Browning vs. Morris*, 2 *Cowp.* 792. *Edmondson vs. Popkin*, 1 *Bos. & Pull.* 270. *Hewitt vs. Fitch*, 3 *Johns. Rep.* 250. 2 *Com. Dig. tit. Chancery*, (C 2,) 204, 205. *Barnadiston vs. Lingood*, 2 *Atk.* 133. *Lowther vs. Condon*, *Ibid* 131. *Scott vs. Nesbit*, 2 *Brown's Ch. Ca.* 641. 1 *Fonbl.* 140, (note.) *Drew vs. Power*, 1 *Sch. & Lef.* 195, 196. *Molloy vs. Irwin*, *Ibid* 313. *Le Guen vs. Gouverneur*, 1 *Johns. Cas.* 436. *Cooper's Plead.* 123, 124, 141. *Kent vs. Bridgman*, *Proc. in Chan.* 233. *Williams vs. Owen*, 1 *Chan. Cas.* 46; and *Fells vs. Read*, 3 *Ves.* 70.

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*T. Buchanan and Magruder*, for the Appellee, referred to *Ware vs. Harwood*, 14 Ves. 51. *Cook vs. Jones*, 2 Coup. 727. *Cooper's Plead.* 58, 60, 88, 89. *Ord on Usury*, 90, 92, 96. *Pollard vs. Scoly*, Cro. Eliz. 25. *Partridge vs. Dorsey's Lessee*, (ante 302.) *Moses vs. Macferlan*, 2 Burr. 1009. *Bateman vs. Willae*, 1 Sch. & Lef. 201. *M. Vickar vs. Wolcott*, 4 Johns. Rep. 510. *Le Guen vs. Gouverneur*, 1 Johns. Cas. 436, 487. *Anonymous*, 2 Ves. 622. *Mariott vs. Hampton*, 7 T. R. 265. *Ramden vs. Jackson*, 1 Atk. 293. *Willams vs. Lee*, 3 Atk. 224. *Contee vs. Cooke*, 1 Harr. & Johns. 179; and *Laming vs. Eddy*, 1 Johns. Chan. Rep. 49.

THE COURT reversed the decree of the Court of Chancery, with costs to the appellant in that court, and in this court; and decreed, that the chancellor direct the auditor of the court of chancery to state and return an account between the parties *West* and *Beanes*, charging *West* on the 2d of February 1802, with one half of the sum of \$2500, stated in the bill to have been originally loaned, with legal interest thereon, and with any other proper charge, and giving *West* credit with one half of the sums paid on account of interest on the said sum so loaned, and with any other proper discounts; and that the chancellor pass such other and further decree in the premises as may be proper to carry into effect the said proceedings in the court of chancery, and the decree and judgment of this court.

DECREE REVERSED(a).

(a) There was also a bill filed in the names of *Calvert* and *West* against *Beanes*, for similar relief against the note executed by *West*, and payable to *Calvert*, for \$2500, upon which suits had been brought at law, and judgments recovered in the name of *Beanes* against the complainants, and which were entered for the use of the U. S. On this bill there were the same proceedings, and decree by the chancellor, and by this court, as in the above case of *West* against *Beanes* and *Oden*.

JUNE (E. S.)

BROWN VS. WARRAM.

In an action of *assumpsit* against one, on a joint promissory note made by himself, and another, he cannot, to defeat the action, rely on the note being joint. If he intended to avail himself of that circumstance, he ought to have pleaded it in abatement

ERROR to Queen Anne's County Court. This was an action of *assumpsit* on a promissory note. The defendant (now defendant in error,) pleaded *non assumpsit*, and issue was joined. At the trial the plaintiff, (now plaintiff in error,) produced in evidence the following promissory note,

to wit: "*Baltimore*, May 30th, 1810. For value received, we promise to pay *Hiram Brown*, or to his heirs or assigns, the sum of one hundred and eighty dollars, on or before the 1st day of June 1811, with legal interest from the above date.

Witness

*S. Wilmer."*

*Lewis Bruen.*

*William Warram.*

And produced the subscribing witness *Simon Wilmer*, who proved the execution and delivery of the said note by the defendant. The defendant then prayed the court to instruct the jury, that the evidence offered by the plaintiff was not sufficient to sustain his action. Which direction the Court, [*Purnell and Worrell*, A. J.] accordingly gave. The plaintiff excepted; and the verdict and judgment being against him, he brought a writ of error to this court.

The cause was argued before BUCHANAN, JOHNSON, and MARTIN, J.

*Chambers*, for the Plaintiff in error, cited *Blackwell vs. Ashton*, *Allyn*, 21. *Holdwick vs. Chase*, *Ibid* 42. *Putt vs. Vincent*, 1 *Vent.* 76, 77. *Putt vs. Nosworthy*, *Ibid* 135, 136. *Boson vs. Sandford*, *Skin.* 280. *S. C.* 2 *Salk.* 440, *S. C.* *Carthew*, 58. *Bull. N. P.* 158. *Rees vs. Abbot*, 2 *Cowp.* 832. *Rice vs. Shute*, 5 *Burr.* 2611. *Cabill vs. Vaughan*, 1 *Saund.* 291, (note 4.) *Abbot vs. Smith*, 2 *W. Blk. Rep.* 947. *Wright vs. Hunter*, 1 *East*, 20. *Govett vs. Radnedge*, 3 *East*, 68, 69. *Harrison vs. Jackson*, 7 *T. R.* 206. *Scott vs. Goodwin*, 1 *Bos. & Pull.* 72. *Robinson vs. Fisher*, 3 *Caine's Rep.* 99; and *Brown vs. Belches*, 1 *Wash. Rep.* 9.

*Carmichael*, for the Defendant in error, cited 3 *Bac. Ab.* 691. *Hill vs. Aland*, 1 *Salk.* 215. *Bull. N. P.* 145, 152, 274; and *Leglise vs. Champante*, 2 *Stra.* 820.

JOHNSON, J. The defendant could not, to defeat the action on the general issue, rely on the note being joint, but if he intended to avail himself of that circumstance he ought to have pleaded it in abatement. For the note being joint did not prove that the defendant had not assumed, and assumed, although another also assumed; there was no variance of course between the *allegata* and *probata*.

JUDGMENT REVERSED, &c.

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TEACKLE VS. NICOLS'S LESSEE.

Teackle  
vs  
Nicols

A conveyance of land lying in Somerset county, executed by the grantor, stated to be of George-Town, in the district of Columbia, and acknowledged by him in Prince-George's county, before J M G, stating himself to be chief judge of the first judicial district of this state. Held, that the deed, and acknowledgment on the face of it, without further evidence, was sufficient in point of law to transfer the property therein mentioned to the grantee

APPEAL from Somerset County Court. Ejectment for part of a tract of land called *Beckford*. The defendant, (now appellant,) took defence on warrant, and plots were returned; and at the trial the plaintiff offered in evidence the plots and explanations, and proved the locations made by him to be correct. He also read in evidence a grant of *Beckford* to *G. W. Jackson*, on the 19th of December 1798. Also a deed from *Jackson* to the defendant, for 9 acres 3 rods and 29 perches of the said tract, described by courses and distances, dated the 19th of May 1802. Also a deed dated the 29th of October 1807, from the defendant, stated in the deed to be of Somerset county, to *J. Teackle*, for (amongst others) the above part of the tract called *Beckford*, conveyed to him by *Jackson*. This deed was acknowledged on the day of its date in Prince-George's county, before *J. M. Gantt*, stated to be chief judge of the first judicial district of this state. He then offered to read in evidence a deed of trust, dated the 13th of April 1809, between *J. Teackle* of *George Town*, in the District of *Columbia*, of the first part; *L. D. Teackle*, (the defendant,) of Somerset county, in this state, of the second part; and *C. N. Bancker*, of the city of *Philadelphia*, of the third part; for the said part of *Beckford*. This deed was signed and sealed by *J Teackle* only, in the presence of *J. M. Gantt*, and was by *Teackle* acknowledged on the day of its date, in the same manner as the last above mentioned deed. Under this deed the lessor of the plaintiff claimed title. To the reading of this deed in evidence the defendant objected, because it did not appear that *J. M. Gantt*, before whom it was executed and purported to be acknowledged, was by law authorised to take the acknowledgment of the same. But the Court, [*Done*, Ch. J. and *Robins* and *Whittington*, A.J.] overruled the objection, and permitted the deed to be read in evidence, and directed the jury that the deed, and acknowledgment on the face of it, without further evidence, was sufficient in point of law, to transfer the property therein mentioned to the grantee. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the cause was argued before *BUCHANAN*, *EARLE*, and *JOHNSON*, J. by

*T. Bayly*, for the Appellant; and by  
*J. Bayly*, for the Appellee.

JUDGMENT AFFIRMED.

AN  
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OF THE  
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1. In an action against a common carrier, where the plaintiffs directed J L to ship to them on board the *Norfolk* packet, a bale of handkerchiefs, and which J L delivered on board the packet to be carried to *Norfolk*, and there delivered to the plaintiffs, but which not having been delivered to the plaintiffs, they retained certain monies of J L in their hands to the amount of the price of the bale of handkerchiefs as and for satisfaction; and the amount to be recovered in this action was to be for the use of J L.—*Held*, that the action could be sustained. *D'Anjou & Ball v Deagle*, 206
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1. In an action on an administration bond, the condition of which was not in the words of the form prescribed by the act of 1738, *ch. 101*, *sub ch. 3*, s. 11, or *sub ch. 14*, s. 6, the defendant pleaded general performance, and to the replication assigning for breach the nonpayment of an account, which the person, for whose use the action was brought, had against the deceased, the defendant demurred generally.—*De, murver overruled. Hamilton v The State use of Jameson*, 503

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1. Where the court of appeals reversed a decree of the court of chancery, and directed that the defendants account with the complainant, and that the chancellor have the account stated by the auditor, &c. which being done, and a decree passed for payment of the sum stated to be due from the defendants to the complainant—an appeal lies from such decree to the court of appeals. *Gover, et ux. v Hall, Ex'r. of Garrett, &c.* 43

2. — Whether or not on such an appeal, the decree of reversal of the court of appeals is conclusive? *Ib.*

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1. In an action on a bond to submit matters to arbitration, the defendant pleaded that no award was made and delivered by the arbitrators to the parties, within 60 days, according to the condition of the bond, to which the plaintiff replied, that by a writing endorsed on the bond, and signed by the defendant, further time was given to the arbitrators until, &c. to make an award, and that an award was made and delivered before that day. The replication, on demurrer by the defendant, was ruled to be bad. *Peters v Johnson*, 291

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1. If the prior counts in a declaration in *assumpsit* set out the consideration, and the last count refers to them, and is founded on the consideration specified in those counts, it incorporates so much thereof in the last count as to render it valid. *Dent's Adm'r. v Scott*, 28
2. In *assumpsit* for the price of certain shares of stock in a bank, sold by the plaintiff to the defendant, and which the plaintiff offered to transfer to the defendant, but which he refused to accept, &c. The evidence was, that the sale of the stock was effected through a broker. *Held*, that the sale of bank stock is within the statute of frauds of 29 Car. II, ch. 3; and that the broker who effected the sale was the common agent of both the owner and the purchaser. *Colvin v Williams*, 38
3. In *assumpsit* for money laid out, expended and paid, by the plaintiff for the defendant, being for one half of the costs recovered against them in an action of ejectment, wherein they were joint defendants, and made a joint defence—*Held*, that the plaintiff is entitled to recover, although the defendant, with a view to save costs, agreed with the plaintiff in the action of ejectment, that certain old plots, on which the lands in dispute were located, should be used in evidence at the trial, but which agreement the plaintiff in this action, refused to accede to, and insisted that new plots should be made out, whereby a large amount of costs was unnecessarily incurred, and although he gave notice that he would pay no part of such costs. *Norwood v Norwood*, 57
4. L entered into an injunction bond together with O, as the sureties of J, to stay proceedings on a judgment recovered against J by B, which bond was signed and sealed by L, but his name was afterwards erased, and the name of H substituted in its place. On the dissolution of the injunction a warrant from a justice of the peace was obtained on the bond by H against L, and the justice expressing his opinion that L was bound to pay B's claim on the bond, L paid the money. L afterwards brought an action of *assumpsit* for money had and received, against B, to recover back the money—*Held*, that if L did sign and seal the bond, but that his name was erased therefrom before the delivery thereof to the clerk of the court, and before the injunction was granted by the court, and that the bond was approved, and the injunction was granted as the bond of J, H and O, then B had no right to recover the before mentioned money of L, and that L was entitled to recover the money back. *Lodge v Boone*, 218
5. P C being the agent of P S, did, as such, contract and agree with W C to sell to him a house and lot for \$190, and an agreement in writing to that effect was entered into by P S with W C, and that on payment of the money a deed should be executed by P S to W C. The amount of the purchase money was paid by W C to P C, who, before the payment of the money to him, stated to W C, that if any difficulties should arise about the title to the lot, he was good for the money, and would return it to him. In an action of *assumpsit* for money had and received, brought by W C against P C, evidence was given that a claim had been made to a part of the lot, and it had been actually enclosed with a fence by R O, and that no deed for the lot had ever been made or tendered by P S, or any other person, to W C. The court refused to direct the jury, that no parol evidence could be received to show that a claim had been made to any part of the lot, and that it had been enclosed; or to direct them that the plaintiff was not entitled to recover in this action. *Cloherly's Ex'r. v Creek*, 428
6. In an action of *assumpsit* brought by J H, for the use of N Y, against J B, for a sum of money stated to be received for him by J B, from the sale of the cargo of a vessel belonging to J H, which had been captured, &c.—*Held*, that J H, having caused the said cargo to be insured by N Y, (for whose use the action was brought,) and after the capture had abandoned the cargo to the insurer, and had been paid by him, the action could not be maintained. *Hollins v Barney*, 437
7. In *assumpsit* for labour, &c. by P

against D, it was proved that P and D agreed that P should build a house for D, and that after the house was built, if D should disagree as to P's bill, then two workmen should be selected to value the work. The house being built, two persons were selected by P and D, who measured and valued the work. *The court* refused to direct the jury, that inasmuch as a special contract was proved, the action of *assumpsit* could not be supported, but that an action on the special contract was the proper remedy. *Mudd v Mudd*, 438

8. In *assumpsit* by P against D, on a note in writing, by which D promised to pay to P the amount of an arbitration bond assigned to him by B, and accepted by D, and also to pay P such balance of J's open account as should appear to be due, with averments as to the amounts of those respective claims. D pleaded *non assumpsit*, and the act of limitations, to which issues were joined, and there was a verdict for P on the *first issue*, and damages assessed, and no disposition made of the other issues. On this verdict judgment was rendered for P. *Scott v Lancaster*, 441

9. In *assumpsit* against one on a joint promissory note made by himself and another, he cannot, to defeat the action, rely on the note being joint. If he intended to avail himself of that circumstance, he ought to have pleaded it in abatement. *Brown v Warram*, 573

See Bill of Exchange 2, 3, 4, 6, 7.

- Corporation 2.
- Freight 2, 3.
- Partners & Partnership 1, 2, 3.
- Warranty 1.

#### ATTACHMENT.

1. The return of a sheriff to a writ of attachment on warrant, was that he had attached of the goods, &c of the defendant "his life estate in all the lands got by his wife, supposed to be 450 acres"—*Held*, that the return was defective in not describing with sufficient certainty the land attached, so as to lay a legal foundation for a judgment of condemnation. *Fitzhugh v Hellen*, 206

#### ATTESTATION.

See Evidence 40.

#### ATTORNEY AT LAW.

1. Whether or not the attorney of the

plaintiff is bound to answer whether or not he has in his possession certain letters written by the defendant to the plaintiff relative to the subject matter in dispute? *Quere. Walsh v Gilmore et al.* 392

#### AUCTIONEER.

1. T Y executed to the Mayor, &c. a bond as auctioneer, with D M his surety, under an ordinance requiring such bond to be executed before the obtaining a license as auctioneer. The license was granted to T Y before the bond was given. After the license and bond were so obtained and given, W and H sent certain goods to T Y, to be sold at auction, who sold the same, but did not pay over the proceeds to W and H. There was no provision in the ordinance authorising such bonds to be sued for the use of individuals; but the Mayor gave general directions to the register to deliver copies of the auctioneer's bond to any person having claims against him as such, and a copy of the bond was in pursuance of that order, delivered to W and H, who brought suit thereon in the names of the mayor, &c. for their use, against D M, the surety therein—*Held*, that they were entitled to recover. *M'Meehan v The Mayor, &c. of Baltimore*, 534.

2. If goods are sent to an auctioneer, with directions to sell them at public auction, and he sells them at private sale, without authority, and does not pay over the proceeds, it is a breach of the condition of his bond as auctioneer. 46.

See Evidence 28.

#### AUTHENTICATION.

See Evidence 40.

#### AUTHORITY.

- See Commission & Commissioners 1.
- General Assembly 1.
  - Judges & Justices 1.
  - Promissory Note 5.
  - Special Authority.

#### AVERMENT.

- See Award 10.
- Bill of Exchange 7.
  - Contract 4.
  - Debt 1.
  - Declaration 4.
  - Verdict 5.

## AWARD.

1. Where the plaintiff had produced in evidence certain letters written to him by the defendant relative to a contract for the sale of brandy, and for submitting their dispute to arbitrators—*Held*, that the whole correspondence on the subject, if produced, would be received in evidence, so far as the same might be explanatory of the terms of the reference, and what was intended to be submitted by the parties to the arbitrators. That if the plaintiff would not produce all the letters, the defendant might give evidence of their contents, so far as they related to the reference. But if the letters were not produced, the jury ought not to presume that they would, if produced, operate against the plaintiff, and go to prove that the terms of the reference were different from those declared upon by him. *Walsh v. Gilmer*, et al. 387, 391.

2. — A paper signed by the defendant as a submission to arbitration, is competent, legal, and admissible evidence, although the plaintiff did not produce and read in evidence the letters of the defendant upon the subject of the arbitration. *Ib.* 392

3. If an award, made in pursuance of a submission of the parties, exceeds the subject matter referred, it does not annul the original contract, which is the subject of the reference, further than the award pursues and is conformable to, the terms of the reference. *Ib.* 395

4. Damages cannot be recovered for a nonperformance of an award further than so far as the award is conformable to the submission. *Ib.*

5. The terms and stipulations between the parties, on which their matters in dispute were to be submitted to reference, are matters of fact to be determined by the jury on evidence adduced to them. *Ib.* 394

6. If part only of a subject matter is referred to, and awarded upon by arbitrators, the party is at liberty to comply with the award, without also complying with all the terms of the original agreement. *Ib.* 398

7. Where the court refused to direct the jury that the evidence offered was sufficient for them to find for the plaintiff in an action upon an award for a noncompliance therewith. *Ib.*

8. An award made in pursuance of a submission to arbitrators, either separate

from, or connected with, the original contract, is not legal or competent evidence to be admitted in support of a count in the declaration founded upon the original contract. *Ib.* 399

9. Where an award was considered as being within the terms of the submission of the matter in controversy. *Ib.* 407

10. Where an award directed that the defendant should give an endorser, "as per agreement submitted to the arbitrators and acknowledged by the parties," and although it may be susceptible of being made certain and good, by reference to the agreement to which it relates, if there be no sufficient averment in the declaration by which the defect is cured—both the declaration and award are bad in that particular. *Ib.* 409

See Arbitration & Arbitrators 1.

— Ejectment 25.

## B.

## BANKRUPT &amp; BANKRUPTCY.

1. The proceedings of the commissioners of bankruptcy are not legally admissible as evidence to prove the act of bankruptcy committed by the bankrupt. *Wood v Grundy & Thornburgh's Lessee.* 13

2. Where a conveyance of a lot of ground from A B, (who had committed an act of bankruptcy,) to W M, was held not to be fraudulent, it having been made for a valuable consideration, and for the purpose of substantially complying with an engagement of A B to I and J P, to transfer bank stock to them to secure them against any loss they might sustain by endorsing three promissory notes for his accommodation; and A B, not having bank stock, when applied to by I and J P, offered the lot of ground to them as a substitute, and at their instance, sold and conveyed it to W M, who took up the said notes. That the preference acquired by I and J P was consequential, and nothing more than a substantial fulfilment of the engagement made by A B to them at the time of endorsing the notes. *McNeehan's Lessee v Grundy & Thornburgh.* 185

3. To render a payment or transfer by a debtor to his creditor fraudulent as to other creditors, under the bankrupt law, it must be spontaneously made, in consequence of a formed design to become a bankrupt. *Ib.*

4. — Where a conveyance made by A B, (a bankrupt,) was not voluntary, but produced by the application of a creditor for a transfer of bank stock, which such creditor was entitled to by contract, the refusal of A B to comply with his engagement, or to make any provision to indemnify the creditor, would have subjected him to an action at law, or bill in chancery for a specific execution of his contract, and in that point of view the application of the creditor must be considered as importunate and pressing.

*Id.*

See Partners & Partnership 2.

### BANK STOCK.

See Agent 1.

— Statute of Frauds 1, 2.

### BAR.

See Court of Chancery 49, 51.

— Infant 2, 3.

### BARGAIN & SALE.

See Conveyance 2.

— Feme Covert 2, 3, 4.

### BARON & FEME.

See Husband & Wife.

### BASE FEE.

See Ejectment 30.

### BEGINNING OF A TRACT OF LAND.

See Calls.

— Grant 9.

— Parol Evidence 5, 6.

### BEQUEST.

See Devise.

— Legacy 1.

### BILL OF EXCEPTIONS.

1. The court will not permit a statement of facts, considered irrelevant to the subject matter, to be added to a bill of exceptions taken at the trial of the cause. *Waksh v Gilmer, et al.*

337, 398

2. The court will decide whether certain parts of a statement of facts, made preparatory to a bill of exceptions being taken, and which are objected to, are legal evidence to prove any particular fact. *Stewart, et al. Lessee v Mason,*

527, (note.)

See Verdict 5.

### BILL OF EXCHANGE.

1. A subsequent endorser of a bill of exchange, discounted for the accommo-

dation of the drawer, can, in an action of *assumpsit*, recover against a prior endorser, the whole amount recovered against him by, or by him paid to the holder of the bill. *Ward v Re-pold,*

125

2. — Such prior endorser, by his endorsement and delivery of the bill to the drawer, impliedly engaged to indemnify any person who should legally come to the possession of it, in case of default on the part of the drawer or drawee.

*Id.*

3. — The endorsement, and delivery of the bill by such prior endorser to the drawer, amounts, as to all subsequent parties, to an admission of a valid consideration; and each prior endorser cannot set up the want of a money consideration between himself and any subsequent endorser.

*Id.*

4. In *assumpsit* on a foreign bill of exchange by the second endorser, who had paid the bill, against the payee, evidence was offered to prove, that the original bill, and an original protest for nonacceptance, and protest for nonpayment, were delivered to the attorney of the then holder of the bill, for the purpose of instituting suits thereon against the payee and second endorser, (the plaintiff and defendant in this action.) Records of the judgments rendered in those suits on the said bill, were also offered in evidence; and also parol evidence, that the protest for nonacceptance was lost or mislaid—*Held*, that the testimony was competent to prove the protest for nonacceptance of the bill. *Clarke v Harris,*

107

5. A witness, an agent of the holder of a bill of exchange, proved, that in the usual course of the post he received protests for the nonacceptance, and nonpayment of the bill, and on the days that he received them, he gave the defendant (the payee,) verbal notice of such protests, and shortly after, either the same or the next day, for greater certainty he made out written notices of the protests, to be sent to the defendant, and copied them in a book, which he produced, and that the defendant afterwards admitted he had received the said written notices—*Held*, that the evidence was admissible, although the notices were in writing, and no notice had been given to the defendant to produce them.

*Id.*

6. Where A drew a bill of exchange on B, for the sole purpose of having it

discounted to raise money for the use of A; and for enabling him to do so, C to whom the bill was made payable, at the request of A, endorsed the bill in blank, and delivered it to A, who afterwards, for the purpose of giving it further credit, and thereby enabling him to raise money on it for his own benefit, applied to H, who for that purpose endorsed the bill in blank, and delivered it to A, who sold it to S for his own benefit. The bill not being accepted or paid, was duly protested, and legal notice thereof given to the parties, and payment demanded, which was made by H. In an action of *assumpsit* by H against C to recover the amount so paid—*Held*, that H was entitled to recover from C the sum of money so paid by him. *Id.*

7. — In such an action it need not be averred in the declaration that the defendant had notice of the protest for nonpayment of the bill, and that the plaintiff had paid the amount, &c. *Id.*

#### BILL OF REVIEW.

See Court of Chancery, 4.

— Infant 1, 2, 3.

#### BILL OF SALE.

1. An instrument of writing, purporting to be an original bill of sale, and to have been signed and sealed by the vendor named therein, and by him duly acknowledged before a justice of the peace, with an endorsement thereon, proved to be in the hand-writing of a person accustomed to write in the clerk's office of the county, stating that the instrument of writing had been duly recorded in the land records of the county—*Held*, that it was sufficient evidence. *Ayres v Grimes.* 95
2. C B executed a bill of sale of sundry slaves to C S, to secure the payment of a debt *bona fide* due, C B and C S being both at that time residing in the county of Washington, in the District of Columbia, which bill of sale was duly executed, acknowledged and recorded, agreeably to the laws of that part of the District, and which were the same as the laws of this state. C B afterwards removed into this state, bringing with him the slaves, which had remained in his possession, and over which he exercised acts of ownership, paid the county assessment thereon, and sold some of them. C B, before and after his bill of sale to

C S, was indebted to F D of said county and District, who recovered a judgment against C B in *Alleghany* county court in this state, to which county C B had removed with the said slaves. Upon that judgment a *fiery facias* issued, and the said slaves were taken and sold by the sheriff, against whom C S brought an action of trespass *vi et armis*, &c.—*Held*, that C S was entitled to recover, there being no proof to impeach the validity of the bill of sale, or contaminate the transaction with fraud, nor that the property transferred was more than sufficient to pay the debt intended to be secured. *Bruce's adm'rs. v Smith.* 499

3. It is the right of a debtor to give preference to one of his creditors by a fair and honest transfer of his goods, adequate to the payment of his debt. *Id.*
4. The retaining, by the grantor, possession of property included in a bill of sale duly executed, acknowledged and recorded, is sanctioned by the act of 1779, ch. 8, and the bill of sale cannot be invalidated by it. *Id.*

See Evidence 40.

#### BLANK.

See Promissory Note 6.

#### BLANK ENDORSEMENT.

See Promissory Note 9.

#### BOND.

1. Where the affidavit on a bond made by the obligee, was sufficient to warrant its assignment under the act of 1763, ch. 23, s 10. *Boyer v Turner's Adm'r.* 285
2. To enable the assignee of a bond to maintain an action against the assignor, he must prove that the obligor was unable to pay the debt, or that he could not be found in the place or county of his usual abode, or that some other thing or casualty happened, whereby he was not able to recover his debt from the obligor, though he had used due diligence for that purpose. *Id.*

See Appeal Bond.

- Arbitration & Arbitrators 1.
- Assumpsit 4.
- Auctioneer 1, 2.
- Breaches 1.
- Evidence 20, 22, 34.
- Pleading 7.
- Release 1.
- Special Authority 1.

**BOUNDARIES OF LAND.**

See Calls.

— Commission & Commissioners 2.

— Grant 7, 8, 9.

— Parol Evidence 5, 6.

**BREACHES.**

1. A judgment rendered for the plaintiff on a case stated in an action on a bond, with a collateral condition, was reversed because there was no replication assigning the breaches. *Kerr et al. v The State use of the Levy Court, &c.* 560

See Auctioneer 2.

— Pleading 7.

**BROKER.**

1. A broker who disposes of bank stock for another, is to be considered as the agent of both the owner and the purchaser. *Colein v Williams,* 38

**C.**

**CALLS IN SURVEYS & GRANTS.**

See Grant 3, 7, 8, 9.

— Parol Evidence 1, 4, 5, 6.

**CAPIAS AD SATISFACIENDUM.**

1. Where a *ca sa* is returned *cepi*, and the plaintiff does not proceed to enforce the writ, by having the defendant committed, defaulting the sheriff, or having the execution entered not called, it did not preclude the plaintiff from taking out a new *ca sa*. *West's Ex'x. v Hyland,* 200

See Escape 1.

— Sheriff 2.

— Terretenant 2.

**CAPITA.**

See Descents 2.

**CASE STATED.**

See Pleading 9.

— Replication 1.

**CAUSE OF ACTION.**

See Assumpsit 8.

— Declaration 4.

— Release 1.

**CAUTION MONEY.**

See Composition Money.

**CAVEAT EMPTOR.**

See Warranty 1.

**CERTAINTY.**

See Attachment 1.

**CERTIFICATE.**

See Bill of Sale 2.

— Evidence 7, 40.

**CERTIFICATE OF SURVEY.**

1. The time when a certificate of survey was returned to the land office, and when the caution money was paid thereon, are facts for the decision of the jury. *Stewart, et al. Lessee v Mason,* 531, 534.
2. Evidence that the certificate of an elder survey was in the land office when a junior survey was made, and an elder grant obtained thereon, is for the decision of the jury. *Ib.*

See Ejectment 22.

— Grant 5, 9.

— Parol Evidence 5.

— Presumption 6.

— Relation 1, 2.

**CESTUI QUE USE.**

1. The plaintiff may require the person, for whose use the action was instituted, to produce the assignment, if any he hath, under which he claims the action for his use. *Harris v Jaffray use of Gwynn,* 545

See Action 1.

— Assumpsit 6.

**CHANCERY.**

See Court of Chancery.

**CHEAT.**

See Slander 2.

**CHOSE IN ACTION.**

See Assumpsit 8.

**CHRISTIANS.**

See Witness 5.

**CIVIL OFFICER.**

See Evidence 36.

— Inspector of Tobacco 1.

**CLERICAL MISTAKE.**

See Inquiry of Damages 1.

**CLERK.**

1. The endorsement, on a paper purporting to be an original bill of sale, and to have been duly executed and acknowledged, proved to be in the hand-writing of a person accustomed to write in the clerk's office of the county, stating that the said paper had been duly recorded—*Held*, that it was sufficient evidence, &c. *Ayres v Grimes,* 95

See Evidence 7, 28.

## COLLATERAL CONDITION.

See Breaches 1.

## COLLATERAL RELATIONS.

See Descents 2.

## COMMISSION.

See Agent 1.

## COMMISSION &amp; COMMISSIONERS.

1. Where in the return of a commission issued to a foreign country to take testimony, the commissioners' oath appears to have been taken, and is certified by them to have been duly taken, it is sufficient, without other proof, that the persons who administered the oath had authority for that purpose. *Wilson v Mitchell*, 91
  2. The return to a commission for establishing the boundaries of land issued in 1784, being defective, it not appearing that legal notice had been given, the plaintiff in ejectment offered in evidence that the original commission and testimony, reduced to writing by the commissioners, and their return, were duly returned and recorded, and in the margin of the record thereof marked "*Ecom'd & Deliv'd. R D*," that *R D* attended to the execution of the commission for the persons who obtained it, they residing and continued to reside more than 100 miles from the land, and that they and *R D* were all dead; that the original commission, &c. were not to be found, although diligent searches thereof had been made amongst the papers of *R D*. He then offered to prove by two of the commissioners, that the persons examined by them as witnesses were dead; and then offered to prove what such persons declared, when so examined by the commissioners, in their presence and hearing, and that such declarations were by them reduced to writing, and returned as the depositions of said witnesses—*Held*, by the county court, that the loss of the commission, &c. was not sufficiently proved to let in parol evidence of the contents of the depositions taken and returned by the commissioners. *Ringgold v Galloway, et ux. Lessee*, 453
- See Conveyance 5.  
 — Court of Over & Terminer &c. 1.  
 — Evidence 27.  
 — Grant 6.

## COMMON CARRIER.

1. In an action against a common carrier, where the plaintiff directed *J L* to ship to them by the *Norfolk* packet a bale of handkerchiefs, and which *J L* had delivered to the cabin boy on board the packet to be carried to *Norfolk*, and there to be delivered to the plaintiffs; but which not having been delivered to the plaintiffs, they retained certain monies of *J L*, in their hands, to the amount of the price of the bale of handkerchiefs, as and for satisfaction. Evidence was given that the amount to be recovered in this action was to be for the use of *J L*—*Held*, that the action could be sustained. *D'Anjou & Bull v Deagle*, 206

## COMMON RECOVERY.

See Ejectment 29, 30.

— Feme Covert 1.

## COMMON WARRANT.

See Composition Money 2.

— Grant 5.

## COMPETENCY OF EVIDENCE.

1. It is the exclusive right of the court to decide on the legality and competency of all testimony offered to the jury. *Cockey's Lessee v Smith*, 27

## COMPETENT WITNESS.

See Evidence 23, 25.

— Promissory Note 8.

## COMPOSITION MONEY.

1. The time when the composition money was paid on a certificate of survey, is a fact for the decision of the jury. *Stewart, et al. Lessee v Mason*, 528
2. The composition money may, under the rules of the land office, be paid on a certificate of survey, by the application of a warrant for a different tract of land, as well as if paid in money. *Id.* 529, 532

See Presumption 6.

— Relation 1.

## CONDITIONAL DEVISE.

See Devise 6.

## CONFISCATION.

See Conveyance 5.

— Grant 6.

— Vacant Land.

## CONSENT.

See Pleading 2.

CONSIDERATION.

- See Bill of Exchange 3.  
 — Declaration 1.  
 — Pleadings 1.

CONSTITUTION.

- See Court of Oyer & Terminer &c. 1.

CONSTRUCTION.

- See Conveyance 2.  
 — Covenant 4.  
 — Devise.  
 — Grant 8.  
 — Usury.  
 — Will.

CONTENTS.

- See Award 1.  
 — Bill of Exchange 1.  
 — Commission & Commissioners 2.  
 — Evidence 9, 29.  
 — Power of Attorney.

CONTINGENT DEVISE.

- See Devise 1, 6.

CONTRABAND TRADE.

- See Insurance 1.

CONTRACT.

1. An heir or issue in tail, claiming *per formam doni*, is not compellable to fulfil a contract entered into by the tenant in tail for a sale of the entailed land. *Partridge v Dorsey's Lessee*, 302
  2. Where W had contracted with G for the purchase of a quantity of brandy, which was afterwards sent to the warehouse of W by G, and W refusing to keep the brandy according to the contract, it was with his knowledge and acquiescence taken from his warehouse by G, for the purpose of sale at auction, &c. such removal and sale did not operate in law to rescind the contract. *Walsh v Gilmer, et al.* 497
  3. In actions founded on contracts, the contract must be set out either in the words in which it is made, or according to the legal effect; and contracts being in their nature entire, if the contract proved, and that declared upon, be different in any part, the variance is fatal. *Ib.* 408
  4. Whatever is alleged in a declaration as inducement, and is not impertinent and foreign to the action, must be proved as alleged; and when a contract is alleged and described, a variance is equally fatal, whether the action be upon the contract itself or upon some collateral matter. *Ib.* 409
- See Assumpsit 7.  
 — Court of Chancery 14.  
 — Covenant 1.

CONVEYANCE.

1. A deed executed in 1683, and stated to be made between T W, and J his wife, of the one part, and J P of the other part, and that T W, with the consent of J his wife, in consideration of, &c. granted, &c. to J P, and his heirs, a parcel of land, &c. and was signed and sealed by T W, and J his wife, and acknowledged by them in open court, "the said J being first privately examined as the law requires" — *Held*, that the deed was inoperative to pass a fee from J, the wife of T W, to J P, she not being a grantor in the deed. *Hawkins's Lessee v Gould*, 243
2. T and E, by their deed of bargain and sale, conveyed to R "all that lot or parcel of ground, situate and lying in Baltimore town, which is known and distinguished on the plat of said town by the No. 25, and beginning for the same at," &c. describing the same by courses and distances, "to have and to hold the same and every part thereof, unto the said R," &c. — *Held*, that the whole of the lot passed by the general description of all that lot No. 25, although it was not included within the special description by course and distance. *Buchanan's Lessee v Stewart*, 329
3. Parol evidence is inadmissible to prove that it was the intention of a grantor, in a deed of bargain and sale, to convey a lot of ground by the courses and distances used therein, and not the whole lot. *Ib.*
4. D H, of the state of Pennsylvania, and R his wife, by a deed, signed, sealed, and delivered by them, and dated the 10th of February 1782, conveyed to W H, certain lands in this state, of which R was seized in fee. It was acknowledged by them as their respective act and deed on the 14th of February 1782, before a justice of the supreme court of the state of Pennsylvania, who took and certified the privy acknowledgment of R, the wife of D H, in the mode prescribed by the laws of this state, to which there was the certificate of the president of the supreme executive council of the state of Pennsylvania, under the seal of the state, that the person who took the acknowledgements was one of the justices of the supreme court of that state. The deed was duly recorded in the records of the county in which the lands lie, on the 7th of May 1782; but it was not acknowledged by D H, except in the manner before stated—

*Held*, that the deed was inoperative to pass the interest of R in the lands therein mentioned to W H, the grantee in the deed,—the acknowledgment by D H not being in the manner prescribed by law—the law not authorising the husband, though a nonresident, to acknowledge a deed so as to pass lands in this state, before any officer or tribunal out of the state. *Lawnrence, et ux. Lessee v Heister, et al.* 371

5. A deed executed by certain persons, stating themselves to be commissioners appointed to preserve confiscated British property, to a purchaser of such property, is sufficient to vest a title in the purchaser, so as to enable him to support an action of ejectment for a recovery of the land conveyed. *Hutchings v Talbot et al. Lessee.* 378

6. The Lord Proprietary, by his agent, in 1742, leased to J W, for 99 years, a parcel of land called W P, being part of one of his Lordship's reserved manors. The administrator of J W, in 1747, assigned the lease, with the approbation of the agent, to D M, who by his will in 1765, devised the land to be equally divided between his sons D and J. These two sons being in possession, conveyed their interest, one of them in 1769, and the other in 1774, to W M, but the deeds were not recorded within the time prescribed by law. W M, under those deeds, entered into possession, and held it until 1794, when he made a contract with N M respecting the same—*Held*, that the above facts laid a sufficient foundation for the jury to presume good and valid deeds from D and J to W M, of the said land, although it appeared that there had been deeds executed, and not properly recorded. *Bradford's Lessee v McComas, et al.* 444

7. A conveyance of land lying in Somerset county, executed by the grantor, stated to be of George town, in the District of Columbia, and acknowledged by him in Prince George's county, before J M G, stating himself to be chief judge of the first judicial district of this state—*Held*, that the deed and acknowledgment on the face of it, without further evidence, was sufficient in point of law to transfer the property therein mentioned to the grantee. *Teackle v Nicola's Lessee.* 574

See Acknowledgments of Deeds 1.

— Bankrupt & Bankruptcy 2, 3, 4.

— Covenant 2, 3.

— Court of Chancery 8.

See Ejectment 22, 23, 24, 28, 31, 34.

— Evidence 16, 34, 47.

— Exchange 2.

— Feme Covert 1, 2, 3, 4.

— Grant 6.

— Presumption 1, 2, 4.

— Trust & Trustee 2.

#### COPY.

See Evidence 7, 26, 32, 40.

— Office Copy.

#### CORPORATION.

1. In general a corporate body cannot act but by its seal; but this position cannot be extended so far as to prevent their liability from the nature of their institution, or for acts done, necessarily or incidentally arising from an authority delegated to their agent. *Kennedy v Baltimore Insurance Company.* 367

2. The action for money had and received is an equitable action, and the plaintiff in support of it, can resort to, and prove all equitable circumstances incident to his case; and where money was received by an agent of a corporation, an assumption in law was created by the corporation in receiving the money through their agent. 16.

See Policy of Insurance 1.

#### CORRESPONDENCE.

See Evidence 19.

#### COSTS.

See Assumpsit 3.

— Inquiry of Damages 1.

#### COUNTERLOCATION.

See Location of Lands 1.

#### COUNTY COURT.

1. The county court has no power, under the act of 1785, ch. 49, or any other law, to order that a public road should be opened. *Greenwood v Stinner.* 485

#### COURSE & DISTANCE.

See Grant 3.

#### COURT.

See County Court.

— Ejectment 26, 27.

— Grant 8.

— Partners & Partnership 8.

#### COURT OF APPEALS.

1. Where the court of appeals reversed

a decree of the court of chancery, and directed that the defendants account with the complainant, and that the chancellor have the account stated by the auditor, &c. which being done, and a decree passed for payment of the sum stated to be due from the defendants to the complainant—an appeal lies from such decree to the court of appeals. *Gover, et ux. v Hall, Ex'r. of Garrett, &c.* 43

2. — Whether or not on such an appeal, the decree of reversal of the court of appeals is conclusive? *Ib.*

3. An act of assembly directing the court of appeals to hear and determine the matter of a former decree of that court. *Ib.*

4. An appeal lies from an interlocutory decree of the court of chancery. *Ib.*

5. The court of appeals having reversed a decree of the court of chancery, stated an account between the parties, and decreed accordingly; and also decreed, that the chancellor make and pass all necessary orders for carrying that decree into effect. *Turner v Bouschell's Ex'r. et al.* 106

6. The judges of the court of appeals being divided in the opinion, the judgment of the court below is affirmed. *Partridge v Dorsey's Lessee,* 373

7. If the pleadings in a record transmitted to the court of appeals by writ of error, are entered short, the judgment must be reversed. *Scholls et al. v Shrinier,* 490

8. A judgment rendered for the plaintiff on a case stated in an action on a bond with a collateral condition, was reversed, because there was no replication assigning the breaches. *Kerr, et al. v The State use of The Levy Court,* &c. 560

#### COURT OF CHANCERY.

1. On a bill in chancery filed in 1772 by one partner, in his own right, and as administrator of another partner, against a third partner, to be relieved on the ground of fraud and imposition against a bond passed by the complainant, on a settlement of the partnership accounts, to the defendant, in 1756; to have an account of the profits of certain works carried on in partnership from 1751 to 1765; and as administrator of the other partner, to have an account of the share of profits, from which that partner was arbitrarily excluded, during the same period—*Held,* that from the facts in the case, the settlement in 1756 must be taken to be

fair, and if liable to any exceptions, it can only be on the ground of error or mistake; and the complainant can now only be permitted to surcharge and falsify, and that no further than the specifications in his bill. The *onus probandi* is on him; and after a voluntary settlement by the parties themselves of long and intricate transactions, which cannot now be fully known or unravelled; the lapse of nearly 16 years from the time of the settlement to the filing of the bill; the frequent payment of money upon the bond passed on the settlement, and the death of the only material witness—the surcharge or falsification must be clearly demonstrated and proved, before it can be allowed; and from a strict examination of all the proofs, it does not appear that there were any errors or mistakes in the settlement, or that the complainant was in any manner injured. That with respect to the other partner, (for whom profits are claimed by the complainant as his administrator,) it appears that he was left out of the new partnership of 1753; when an account was opened against him, in which he was charged with his proportion of the money advanced by the other partners in the former partnership; that he made considerable payments on that account, and in 1754 gave his note for the balance, which was paid to the order of the complainant, and his account closed. He died in 1760, and never claimed any interest in the partnership after 1753, and there is no evidence that he considered himself, or was considered by others, as a partner. After which acquiescence and lapse of time, a court of equity will presume that his interest was relinquished. *Gover, et ux. v Hall, Ex'r. of Garrett, &c.* 43

2. Where the court of appeals reversed a decree of the court of chancery, and directed that the defendants account with the complainant, and that the chancellor have the account stated by the auditor, &c. which having been done, and a decree passed for payment of the sum stated to be due from the defendants to the complainant—an appeal lies from such decree to the court of appeals. *Ib.*

3. An appeal lies from an interlocutory decree of the court of chancery, *Ib.*

4. Where a bill had been filed in chancery against an infant, for a specific performance of a parol agreement,

- entered into by the ancestor, to convey land to his daughter, and on the answer of his guardian, and his agreement, a conveyance was decreed—On arrival at age of the infant, he petitioned, under the act of *November 1773, ch. 7*, for a reconveyance of the land—*Held*, that in order to show cause why a revision and reconsideration of the decree should take place, the party, who was an infant, may examine the proofs for the decree, and resort to any error on its face, tending to show that the conveyance decreed ought not to have been directed; and also that such decree and proceedings therein could not be pleaded in bar to the relief prayed. *Prutzman et al. v Pitesell*, 77
5. — The petitioner is not confined to the former proceedings only, but may by further proceedings show himself entitled to relief. *Ib.*
6. An infant is not bound by the answer of his guardian if he shows his dissent to it within the proper time. *Ib.*
7. Where the court of chancery decreed a re-conveyance of land, which by a former decree of that court, on a bill filed against an infant for a specific performance of a parol agreement to convey the land, had been directed to be conveyed. *Ib.*
8. On a bill in chancery by R, the representative of J, deceased, to obtain from B, the executor of J, an account of his administration of the personal estate, and payment of the balance due from him; also to obtain from B a conveyance of certain tracts of land, which had been mortgaged or conveyed in trust, &c. in 1766, by J, to certain of his creditors, and by them conveyed to B, on receiving the balance of the mortgage debt—*Held*, that the deeds of 1766, from J to his creditors, are to be considered as mortgages or deeds of trust made to secure the payment of money due to certain creditors of J; that the redeemable quality incident to mortgages or the resulting use, was not extinguished or destroyed by the power vested in the deeds to sell the lands. That B being the executor of J, and having compounded the debts due on the mortgages or deeds of trust, with the creditors of J, for a sum much below the value of the lands, should not take any benefit of the composition to himself, but any advantage resulting therefrom should devolve on the other creditors of the testator; and the right of the surplus, if any should remain after payment of the debts, should vest in his representative, upon the principle that he who accepts a trust takes it for the emolument of the persons for whom he is trusted, and not to take any benefit to himself. *Turner v Bouchell's Ex'r. et al.* 99
9. The court of appeals having reversed a decree of the court of chancery, made a statement of the account between the parties, and decreed accordingly; and also decreed that the chancellor make and pass all necessary orders for carrying their decree into effect. *Ib.* 106
10. To a bill in chancery for the sale of mortgaged premises, the defendant answered, that the mortgage was executed to secure the payment of money loaned at a usurious interest, and he exhibited certain interrogatories to be answered by the complainant—*Held*, that the principle of equity is, that no person is bound to answer so as to subject himself to punishment; but not so where the answering would create or occasion a forfeiture of his claim. The answer of the complainant, admitting the usury, might subject him to a forfeiture or fine for the offence. *Legoux, et al. v Wante*, 148
11. Where the person, who may have borrowed money on usurious interest, seeks relief, he must do equity, and do what is right between the parties, which is the paying or tendering what is legally due. *Ib.*
12. W H by his will, bequeathed a legacy to W H H, the complainant, and appointed S W and S J W his executors. S W acted as executor, and possessed himself of the personal estate of the deceased. W H also by his will, devised to S J W sundry tracts of land, which he made chargeable with the legacy to W H H, in case the personal estate should be deficient. S W never passed any account of the personal estate, and W H H brought suit at law for his legacy, but not being able to prove assets, &c. his suit was dismissed. S W is dead, and by his will appointed H W his executrix, who acted as such, and possessed herself of the personal estate of S W, more than sufficient to pay the legacy to W H H. A bill in chancery was afterwards brought by

W H H against H W executrix of S W, and S J W, charging the above facts, and that W H left a large *real* and *personal* estate more than sufficient to pay all his debts and legacies. The bill was taken *pro confesso* against H W, and she appealed to the court of appeals—*Held*, that if the facts stated in the bill are not sufficient to entitle the complainant to the relief prayed, he cannot resort to the answer of the defendant, the proof taken in the case, or any extraneous matter to supply the defects in the charges contained in the bill. The bill did not charge that the *personal* estate of W H was sufficient to pay the debts and legacies. It charged that the *real* and *personal* estate were sufficient. It charged that S W, executor of W H, possessed himself of the personal estate of the deceased to a *considerable* amount, but it did not state that personal estate of W H came to the hands of the executor sufficient to pay all debts and legacies. It did not state that S W, the executor, wasted or misapplied the personal assets, so as to create a liability on his executrix to the amount so wasted, and to make his personal estate the fund out of which it was to be paid. It did not state that any part of the personal estate of W H came to the hands of H W, executrix of S W. Every bill in chancery must state sufficient facts to entitle the complainant to the relief prayed, or relief under the general prayer. There were not facts charged in the bill sufficient to make H W, executrix of S W, liable to pay the complainant's legacy. The bill to make her liable, ought to have charged the facts herein before stated. The bill being substantially defective, the chancellor, on application, would have granted leave to amend, and the defendant must have answered the amended bill. H W, as executrix of S W, was not the legal representative of W H; and there were not sufficient facts stated in the bill to charge her as executrix of S W with the payment of the legacy. *West's Ex'x. v Hall*, 221

13. On a bill filed in chancery in the name of the obligee in a bond which had been assigned to a third person who was not made a party in the cause—*Held*, that the assignee of the bond should have been made a party. *Coale, et al. v Mildred's Adm'r*, 278

14. The court of chancery has no autho-

rity to decree a specific execution of a contract entered into by a tenant in tail of entailed lands, against the heir or issue in tail, the act of November 1773, ch. 7, extending to *cases* only, where the heir was bound to fulfil the contract of his ancestor. *Partridge v Dorsey's Lessee*, 302

15. — Where the court of chancery did so decree on a false representation of the facts, and the question whether the heir in tail was bound to convey the land in completion of the contract was not before the chancellor, nor could arise in the case—Can such decree, and the conveyance made pursuant thereto, conclude the heir in tail, and operate to divest his right to the land? *Quere*. *Id.*

16. M, a fine sole, under the age of 21 years, but above the age of 16, by power of attorney, authorised her brother J G to make a settlement with R P, the executor of N G, father of M, of her portion of her father's real and personal estate. Such settlement was made, and personal property was delivered to, and a receipt given by J G to R P. On which settlement M became indebted to R P in £617 9 9, for which sum J G gave his bond to R P. On a bill filed in chancery by M, and her husband, against the executrix of R P, to set aside the settlement so made, and to have an account of the said estate, the defendant pleaded and relied on the said settlement and payment to J G, as a bar to the claim—*Held*, that the said settlement be annulled and set aside, and that the defendant, as executrix of R P, she having admitted assets, account with the complainants, &c. *Pottenger's Ex'x. et al. v Stuart et ux*, 347

17. In cases of intestacy, or there being no contrary direction by will, a female, above the age of 16, would be capable of authorising any person, by a common order, to receive her estate, by which she would be bound as far as any payment or delivery should be made. But it is not so clear that she would be bound by a settlement made by her agent, although specially authorised by her. *Per Kelly, Chan.* *Id.*

18. On a bill filed in chancery by E H D, to vacate a sale made of his lands when he was a minor, by E D, a trustee appointed under a decree of the court of chancery, which were (it was alleged,) purchased by S G for the

use of E D, the trustee, and to annul the deeds executed in consequence of that sale—*Held*, that there being sufficient evidence to prove that S G did purchase the lands in question for E D, the trustee; and, on the established principle, that a trustee can never be a purchaser at his own sale, the deeds made in consequence thereof be vacated—there being no evidence that E H D, the only person interested, ever assented to the purchase; and that E H D pay to E D the amount paid by him for the purchase of the lands, &c. *Dorsey v Dorsey's Heirs & Exrs et al.* 410

19. Where it seemed to be unnecessary that the legatees should be made parties to a bill filed against the heirs and executors of the testator *Ib.*

20. It seems not to be necessary, on a bill filed to set aside a sale made by a trustee, to make the representatives of the person, who purchased at such sale for the benefit of the trustee, parties to the suit. *Ib.*

21. Where lands, which had been mortgaged, were decreed to be sold on a bill filed in chancery by the mortgagee, and such lands were sold, the proceeds of the sale, if there is a judgment against the mortgagor prior to the mortgage, is first to be applied to the payment of such judgment, that having a preference to the claim of the mortgagee. *Bell v Brown's Adm'r.* 484

22. D W filed a bill in chancery against J J, to preclude him from obtaining a grant for a tract of land, within the lines of the survey of which tract, D W claimed land, and in 1804 by decree, J J was directed to convey to D W the land so claimed by him. D W, afterwards in 1806, filed a bill against J J and B J, who had been in possession of the land since 1775, for an account of the wood and timber cut off by them, and for the rents and profits of the land. J J and B J in their answer, stated that they had made considerable improvements on the land, more than the value of the rents and profits, for which they claimed to be allowed, and they relied on the act of limitations as a bar to an account.—*Held*, 1. That the former decree for a conveyance; &c. was no bar to this suit. 2. That no allowance ought to be made for improvements, nor any charge allowed to be made for the wood and timber cut off the land. 3. That the act of limitations was a bar to the rents and profits claimed for the three years

next preceding the filing the bill. *Wirt v J. & B. Swell,* 485

23. The court of chancery will grant relief against a judgment rendered by confession, in an action at law upon a promissory note given for a usurious consideration, on payment of the real sum due, with legal interest. *West v Beanes & Oden,* 568

See Devise 8.

— Factor 1.

— Partner & Partnership 3.

## COURT OF OYER & TERMINER, &c.

1. A special court of oyer and terminer and gaol delivery, acting under a commission from the governor, has all the powers and jurisdiction which can be exercised by the county court in criminal cases. *Horsley v The State,* 2  
See Criminal Prosecution 1, 2, 3.

## COVENANT.

1. Covenant on a contract, whereby the plaintiff agreed to finish the carpenter and joiner's work of a house for the defendant, in a plain workmanlike manner, as might be adjudged by a carpenter or joiner, to be thereafter appointed. The plaintiff progressed in the work, but was prevented from completing it by the defendant, who discharged him. A valuation was made of the work done, by persons not appointed by the parties, and evidence given of the damage sustained by the plaintiff—*Held*, that the plaintiff, in order to entitle him to recover, was bound to show, by a person or persons appointed for that purpose by the parties, that as far as he had progressed in the building he had executed it in a plain workmanlike manner; and that as the plaintiff had offered no such evidence, it was irrelevant to go into evidence to show that he was prevented from going on with the work by the defendants, or to go into any evidence of the damage sustained by him. *Ennis v O'Connor, et ux.* 163

2. Covenant on a written promise, under seal, made in 1799, by T, to convey to S six acres of land, lying in a particular place, the purchase money being received. There had been a grant made to T and S, and others, as tenants in common, of 357 acres of land, which had not been divided, and the six acres were a part of the tract. T died in 1800, having refused to execute a deed for the land, but there was no evidence that a deed had been

tendered to him to execute—*Hill*, that S was entitled to recover of the administrators of T, unless they proved to the jury that T had made a regular and legal conveyance of the six acres of land to S, or had tendered a deed for the same. *Pierpoint's Adm'r's.*

*v Pierpoint,* 165

3. — The court refused to direct the jury in the above case that T was entitled to a reasonable time to have the land divided between the several tenants in common, before he was bound to make the conveyance of the six acres, and that T died before that reasonable time had expired. *Ibid.* 116
4. In a deed of conveyance from A to B, for part of a tract of land called C, described by courses and distances, there was a covenant by A with B, stating that "whereas there issue out of *Jones's Falls* two races, or water courses, into that part of C remaining unsold, which races intersect the S 3° E 359 perches line," one of the courses of that part of C conveyed by A to B. And it was agreed between the parties, and covenanted by A with B, "that B, his heirs and assigns, shall have the full and free use and entire benefit of the said two races or water courses, as soon as they intersect the said S 3° E 359 perches line, and that neither A, nor his heirs, &c. will at any time hereafter alter, change or direct, the course of the said two races or water courses, from their present sources through their present channel, or injure the said waters in their said courses, but that the same shall flow freely and uninterrupted through their present channels, until they intersect the said S 3° E 359 perches line, except such part thereof as may be necessary to water the meadows of the said A in his lands; and that the said B shall have free access, with or without workmen, to the sources of the said races, to increase the streams of water, or to do any other matter or thing to them that he may find necessary for their improvement; and that A shall and will at all times hereafter keep the said races or water courses, proceeding from the south westernmost part of the tract called C, in good order and repair through that tract, until it intersects the said S 3° E 359 perches line"—*Held*, that upon a construction of the whole covenant taken together, the intention of the parties was, that A should permit the water to flow through certain channels over his land, as designated in

the covenant, for the benefit of B, and that if the water did, at the date of the covenant, flow through those channels or races, A was bound to keep them in such order and repair, as that the water might always after continue to flow as freely as at that time; but that if the water did not, and could not, come into and flow through the upper race or channel at the date of the covenant, then A was not bound to deepen or widen the race for the purpose of conducting the water to the land purchased by B. *Carroll v Cockey's Adm'r's.* 282

5. In covenant on articles of agreement, whereby E covenanted "to finish the carpenter's and joiner's work of a house for W, in a plain workmanlike manner, as may be adjudged by a carpenter or joiner, as may be hereafter appointed," the declaration (omitted to be stated in the report of the case,) averred that E did finish a certain part of the work in a plain workmanlike manner, and offered to finish the whole work, but W refused to permit him; that after he had finished said part of the work, G H, a carpenter and joiner, was mutually appointed by E and W to adjudge, &c. and who did adjudge that said part, &c. was done in a plain workmanlike manner; and also that T C, by the appointment of E and W, measured the said part, &c. E, in support of the declaration, offered to prove that W had appointed D H to measure and adjudge the work done by E, but that D H refused to act unless some other persons were appointed to act with him; that W then nominated G H, J B and J M, for that purpose, with which appointment E was satisfied; that G H, D H, J B and J M, (all being carpenters,) each of them did individually measure and examine every part of the work; and that G H, in making up his opinion of the work did not rely upon the information of any person but himself, and that his judgment was formed solely from his own measurement and observation; but that G H did not conceive himself authorised to act alone, and said he would not, without the other persons so appointed acted also. G H informed E that he together with D H, J M and J B, had adjudged and measured the work, upon which E expressed his entire approbation—*Held*, that the evidence should not be permitted to go to the jury to support E's declaration. *Ennis v O'Conner & ac.* 164
- See Policy of Insurance 1.

## CRIMINAL PROSECUTION.

1. Certain objections made in arrest of judgment on a verdict of guilty in a criminal prosecution, tried under a commission of oyer and terminer, &c. overruled, viz. Variances between the names of the grand and petit jurors who found the indictment and verdict, and those returned on the *venire*—as to the manner of issuing the *venire* to summon the jury—the committing the prisoner without his being brought into court by a *capias*—the not issuing a *capias*—there being no presentment; and it not appearing that the jurors were freeholders. *Horsey v The State*, 2

2. The court of oyer and terminer, &c. for Baltimore county, have an undoubted power to order the record of proceedings, on an indictment, to be transmitted to an adjoining county court, the party charged having previously complied with the directions of the act of 1805, ch. 65, s. 49. *Davis v The State*, 154
3. The criminal court of Baltimore county, although denominated the court of oyer and terminer, &c. must be considered as a branch of Baltimore county court, exercising criminal jurisdiction only, which is vested in all the other county courts. *Ib.*

See Judgment 2.

— See entry 2.

## D.

## DAMAGES.

See Judgment 3, 4, 5.

## DATE.

See Deposition 3.

— Evidence 43.

— Grant 5.

— Promissory Note 4, 5, 6.

## DAY BOOK.

See Evidence 28.

## DE BENE ESSE.

See Protest 2.

## DEBT.

1. J W by his note, under seal, promised to deliver to R W, on or before, &c. a horse, to be valued by two judicious men at \$75, and in case of a disagreement in the persons so appointed to appraise the horse, he held himself bound and indebted to R W in the sum of \$75. On this note an action of debt was brought for the

\$75, and the note was declared upon as if it had been given expressly for the payment of that sum. A special demurrer to the declaration assigned for causes, a variance between the note and that set forth in the declaration—that there was no averment that J W did not deliver the horse to be valued, nor a disagreement of the persons appointed to appraise the horse, nor a demand of or refusal by J W to deliver such horse. The demurrer was ruled good. *Wales v Walling*, 565

## DEBTOR &amp; CREDITOR.

See Bill of Sale 3.

## DECLARATION.

1. If the prior counts in a declaration in an action of *assumpsit*, set out a consideration, and the last count refers to them, and is founded on the considerations specified in those counts, it incorporates so much thereof in the last count as to render it valid. *Dent's Adm'r. v Scott*, 28
2. The plaintiff cannot, under the act of 1809, ch. 153, take a judgment on a count in his declaration upon which he had given no evidence. *Wilson v Mitchell*, 91
3. Where there had been a verdict for the plaintiff, in an action brought in the name of the assignee of a promissory note, which was not payable to the payee, or order, or bearer, judgment on the verdict was arrested, although there were other good counts in the declaration. *Noland v Ringgold*, 216
4. Whatever is alleged in a declaration as inducement, and is not impertinent and foreign to the action, must be proved as alleged; and when a contract is alleged and described, a variance between the contract alleged and that proved, is fatal, whether the action is upon the contract itself, or upon some collateral matter. *Walsh v Gilmor, et al.*, 409
5. A declaration in *assumpsit* for bank stock sold, and offered to be transferred, &c. *Colvin v Williams*, 33
6. A declaration in *covenant* on a policy of insurance executed by an agent of the assured. *Maryland Insurance Company v Graham*, 62
7. A declaration in *slander* for false statements in an affidavit, &c. *Wilson v Mitchell*, 91
8. A declaration in *assumpsit* on a foreign bill of exchange, by the second

endorser, who had paid the bill, against the payee. *Clarke v Harris*, 167

9. A declaration in *assumpsit* on a special agreement for the sale of brandy, which the defendant refused to accept, &c. and where the matter was referred to arbitrators, who awarded, &c. *Walsh v Gibnor, et al.* 383

10. A declaration in *assumpsit* on a note in writing, whereby the defendant promised to pay to the plaintiff certain sums of money due to the plaintiff from divers persons, on bond, open account, &c. *Scott v Lancaster*, 441

11. A declaration in *debt* on a note, under seal, to deliver a horse, &c. or pay a certain sum, &c. *Wales v Wal-ling*, 565

See Amendment 1.

— Award 8, 10.

— Bill of Exchange 7.

— Contract 3, 4.

— Covenant 5, 8.

— Debt 1.

— Demise 1.

— Ejectment 7, 8.

— Ejectment 3, 4, 5.

— Policy of Insurance 1.

— Variance 1.

— Verdict 5.

## DECLARATIONS.

See Evidence 22, 30.

## DECREE.

1. A bill filed in chancery by an infant on his arrival of age, for a reconveyance of land, by a former decree directed to be conveyed. See COURT OF CHANCERY 4, 5, 6, and *Putzman v Pilecell*, 77

See Court of Appeals 1, 2, 3, 4.

— Court of Chancery 2, 3, 15.

— Evidence 34.

— Infant 1, 2.

— Pleading 7.

## DEED.

See Conveyance.

## DEFECTIVE COMMON RECOVERY, &c.

See Ejectment 29.

## DEFENCE.

See Pleading 1.

## DELIVERY.

See Gift 1.

## DEMISE.

1. The demise laid in a declaration in ejectment being prior to the time when the lessor of the plaintiff's title

accrued, the plaintiff could not recover. *Wood v Grundy & Thornburgh's Lessee*, 19

See Amendment 1.

— Ejectment 7, 8, 19, 20, 21, 36.

— Mesne Profits 2.

— Verdict 7.

## DEMURRER.

See Pleading 4, 5.

## DEPOSITION.

1. A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can, from the nature of the case, be had. *Patterson v Maryland Insurance Company*, 71

2. Depositions taken under a warrant of resurvey issued in a former action of ejectment, and returned by the surveyor with the plots, are, the witnesses being dead, evidence against the parties to the suit, and all claiming under them. *Stewart, et al. Lessee v Mason*, 507

3. — The depositions, tho' dated a day after the date of the execution of the warrant, will, if returned with the plots, be considered *prima facie* as having been taken on the survey. *Ib.*

4. — The sheriff on such warrant is authorised to take all depositions relating to the matter in dispute between the parties, and is not confined to the taking of such testimony only as relates to the bounds of the land to be surveyed. *Ib.*

See Commission & Commissioners 2.

— Protest 1, 2.

## DESCENTS.

1. J S seized of lands, died intestate in 1794, leaving A, a son, and J, a daughter, between whom a division and partition were made according to law. In 1797 J died intestate, and without issue, leaving A, her brother, her heir at law. In 1810 A died intestate, and without issue, or father, mother, brothers or sisters, or descendants from either, but leaving S, the eldest son of W, deceased, who was the eldest brother of J S, and who was the eldest and only uncle of A, and which W died before A. Also other children and grandchildren of W, and the children, grandchildren, and great grandchildren, of sisters of J S. — *Held*, that the lands which descended from J to her brother A, on his death intestate, and without issue, were embraced by the act of 1786, ch. 45, to direct de-

accents, and were to descend under the provisions of that act. *Stewart's Lessee v Evans*, 287

2. A S died in 1810, intestate, and without issue, seized of lands which descended to him on the part of his father, leaving no mother, brother or sister, or any descendants from either; but leaving the children and grandchildren of an uncle and aunts, the brother and sisters of his father—*Held*, that the children of the deceased uncle and aunts took *per capita*, and not *per stirpes*, to the exclusion of the grandchildren. *Stewart v Collier's Lessee*, 289

See Ejectment 36.

### DESCRIPTION.

See General Description.

— Parol Evidence 2.

### DEVISE.

1. W L by his will devised as follows: "I give and bequeath to my dear wife A L, for and during her natural life, my tract of land and plantation called C, (save and except the Rope Walk.)" *Item*. I give and bequeath to my dear son G L, his heirs and assigns, my tract of land called C; but in case my said son should die before he attains of legal age, and without issue, then, I leave and bequeath the said tract of land called C, to my dear wife A L, or her assigns, to be at her own will and disposal, as it originally was, save and except five acres, to be laid off," &c. "and that said five acres, together with the rope walk, I give and bequeath to my dear nephew D B, his heirs and assigns. And it is further my intention, that if my dear wife should die before my dear son G L, so that my estate be vested in him, and he should afterwards die before he attains legal age, and without lawful issue, then," &c. *Held*, that the devise of the Rope Walk to D B was an immediate, and not a contingent devise. *Bowly's Lessee v Lammot*, 4
2. J O, by his will, devised as follows: "I give and bequeath to my loving wife A O, my dwelling plantation, &c. to her during her natural life, and after her decease to fall to my son L O; and if he should die under age, its my will the said land should fall to my son C O, and my daughter A O"—*Held*, that L O took only an estate for life. *Owings v Reynolds et al.* 141
3. F A by his will devised as follows: "I give and bequeath all the land that

I am possessed of, to be equally divided between my two sons A and J, to them and their heirs, for ever; but if in case either of my said sons should die without any heir lawfully begotten of his body, or before he arrives to the age of 20 years, that then in such case his part to be the sole right and property of my surviving son, his heirs and assigns, for ever."

"*Item*. Whereas I have given all my land to my two sons, my will is, that the division life shall begin at," &c. "my son A to have the first choice of the land." "*Item*. My will and desire is, that my son A do, out of his part of my estate, expend so much money as will be sufficient to give my son J a good education," and the testator appointed his son A his executor. A died above the age of 20 years, intestate, and without issue, leaving J his only brother, his heir at law. It seems to have been held, by *Hanson*, Chan. that A took a fee simple under the devise. *Ib.* 144 (note.)

- 4 — *Held*, by *Hanson*, Chan. that the following words in the last clause of the above will, viz, "out of his part of my estate," be transposed so that the clause should read, "my will and desire is, that my son A do expend so much money as will be sufficient to give my son J a good education, out of his part of my estate." *Ib.* (note.)

5. N H by his will in 1729, devised as follows: "*Item*. I will to my beloved wife F, my dwelling plantation called part of M's Lot, and my new plantation called H's Addition; to her, and for her use, without molestation, during her natural life; and after her decease, to my son H and my daughter M. *Item*. I will to my son H my now dwelling plantation, which is called part of M's Lot, to him and his heirs, for ever. Also I will that my son H to have part of that tract of land called H's Addition, adjoining to my now dwelling plantation, and to begin at," &c. "to my son H, and his heirs, lawfully begotten, for ever; but and if he die without issue lawfully begotten, then all this land to the next of kin." The remaining part of H's Addition he devised in tail to his daughter M.—*Held*, that F, the wife of N H, took a life estate in the lands devised to her, and that H, the son, took an estate tail in remainder. *Carrall's Lessee v Maydwell, et al.* 301, (note.)

6. C D, by his will, devised to his son S, and his heirs in tail, certain lands, with

the following restriction or proviso: "But in case my said son S is at this time married, or has disposed of himself in marriage to M S, or shall hereafter marry her, or dispose of himself in marriage to her, then I do hereby revoke, annul, and make absolutely void and of none effect, my said devise to my said son S as aforesaid, except 500 acres of land called," &c. "all which my said lands I do thenceforth and in such case give and devise to my son E, and the heirs of his body lawfully begotten; and for default of lawful issue, then to remain to my above named daughters, and their heirs, for ever." At the time C D made his will his son S was married to M S; and after the death of C D, his son S petitioned the legislature to annul the restrictive clause in his father's will, the devise over, an infant of 14 years, and the daughters of the testator, with the husbands of those that were married, joining in the petition, and "it appearing to the legislature that the marriage of S with M S can be no disparagement," an act was passed, declaring "that the said condition or restrictive clause shall be wholly void, and that the said will shall stand and be construed as if no such clause had been contained therein."—*Held*, by the county court, that the act of assembly was not void; but effectual and operative to annul the condition or restrictive clause subjoined to the devise to S in the will of C D. *Partridge v Dorsey's Lessee*, 302.

7. R W by his will, dated in 1763, after stating, "*and as for my worldly goods which it hath pleased God to bless me with in this life, I give and dispose of in the following manner and form*," devised *inter alia*, as follows: "Item, I give and bequeath unto my son J W, all that part of a tract of land called D, whereon I now dwell, according to the division which I have already made." There were similar devises of other parts and residue of the tract of land called D to his son B W, and to his grandson R W; also a devise of another tract to his grandson R W, and adding "*my aforesaid grandson R W not to inherit his lands aforesaid, until the death of his father A W; and my will is, that my son A W inherit the lands aforesaid, and the benefits of them during his natural life*." Also a devise of another tract to his son J J W. He also bequeathed sundry slaves to his granddaughters, "to be equally divided at the death of their father J J

W, the said J J W to have the use of the aforesaid negroes and increase, during his natural life." He also bequeathed a slave to another granddaughter, a daughter of A W, "*and if she dies without heirs lawfully begotten, then I give the aforesaid negro to my grandson A W*." He also bequeathed certain slaves to his wife during her natural life, and after her death, then to, &c. And then concludes, "*after all my just debts, legacies, wife's thirds, and funeral charges are paid, the remainder of my estate I give and bequeath unto my son J W*."—*Held*, that J W, the son of the testator, took only an estate for life in the tract of land called D; and that the residuary devise could not be construed to pass any real estate; therefore, that the reversion in fee in that tract of land called D, not being disposed of by the will, descended to the heir at law. *Walters, et al. Lessee v Walters*, 201.

8. N G, by his will in 1784, devised as follows: "I give and bequeath unto my son J G, and to the heirs of his body lawfully begotten, all my real estate, at the age of 21 years, provided he does not marry before he arrives to the age of 21 years; if he does, it is then my will that no part of my real estate shall be delivered up to him until he arrives to the age of 25 years. And the profits arising on the said real estate, during the term of five years, to be equally divided between my two daughters hereafter named. But if my son J G should die without lawful issue, I then give and bequeath unto my daughters M and S, and to the heirs of their bodies lawfully begotten, all my real estate, to be equally divided between them. It is also my will, that if my said daughters should marry before the age of 21 years, that then my said real estate shall be taken into the possession of my executors hereafter named, and not to be given to them till they arrive to the age of 25 years." He then bequeathed to his said two daughters all the money due to him upon bond, &c. to be equally divided between them when they arrive to the age of 21 years. And after the payment of his debts, he bequeathed to his said three children all the residue of his personal estate, to be delivered up to them when they arrived to the age of 21 years, to be equally divided between them. He appointed R P his sole executor, and died in 1791. J G, the son, arrived at the age of 21

years in December 1796, without having married.—*Held*, that J G, the son, took an estate *in presenti*, with a remainder in tail to the two daughters, M and S, as tenants in common; and that the two daughters were not to have any of the profits of the real estate, only on the contingency of the son's marrying before 21. That contingency never happened, and they were not entitled to any part of the profits of the real estate. *Pottenger's Ex'x. et al. v. Stuart, et ux.* 347

See Ejectment 28, 24.

— Legacy 1.

### DILIGENCE.

1. What shall amount to due diligence, is a question of law for the decision of the court, upon the facts of the case. *Boyer v Turner's Adm'r.* 285

### DIRECTION.

1. Where the county court directed the jury that the facts proved amounted to a dissolution of the partnership, was on appeal held to be erroneous, and that the county court ought to have left it to the jury to decide, whether from the facts and circumstances proved, the partnership in question was dissolved. *Roache v Pendergast,* 33
- See Sufficiency of Evidence.

### DISCOUNT.

See Set Off.

### DRAWER & DRAWEE.

See Bill of Exchange 1, 2, 3, 6.

### DUE DILIGENCE.

See Diligence.

### E.

#### EJECTMENT.

1. The jury are concluded by the admissions of the parties as located upon the plots in an action of ejectment; but if they disregard the admissions of the parties, and find the beginning of the tract of land, for which the ejectment is brought, at a different place, the subsequent finding of the jury is predicated upon that mistake, and the court have no power to change the verdict. *Hughes's Lessee v Howard,* 9
2. If the verdict of a jury is insufficient or contrary to the admissions of the parties, the court have the power of granting a new trial, or ordering a  *venire*. *Ib.*
3. The jury are to decide on the variation of the compass, and to make such

an allowance as corresponds with the proof—See VARIATION 1, 2, 3 and *Ib.*

4. Where there is a location on the plots in the cause by either of the parties, of a tract of land, deed, plot, &c. and there is no counterlocation by the adverse party, such location is admitted. *Ib.*
5. No evidence can be given of the location of a deed, plot, &c. which does not correspond with it. *Ib.*
6. Where the defendant in ejectment produced and read certain proceedings, which were variant from the location made by him on the plots, without objection made to the legality of the evidence, it cannot render the same legally admissible when offered by the plaintiff. *Ib.*
7. In an action of ejectment the demise in the declaration was stated to be on the 1st of January 1801, and the conveyance offered in evidence, under which the plaintiff claimed, was dated on the 23d of February 1802—*Held*, that an ejectment is an action to try the right of possession to the land in controversy. The lease, entry and ouster, laid in the declaration, are fictitious, and substituted in the place of a real lease, actual entry and ouster. The time of the demise is matter of substance, and not form, and the plaintiff must show a title in his lessors anterior to the time of the demise, because without such title they could not make a real lease. *Wood v Grundy et al. Lessee,* 13
8. The court will allow the plaintiff in ejectment to amend his declaration, by changing the time of the demise, at any time before verdict, on such terms as will impose no hardships on the defendant. *Ib.*
9. In an action of ejectment brought for lot No. 687, on a plot of that part of the city of Baltimore called *Howard's* late addition to Baltimore town, the plaintiff read in evidence a grant of *Lun's Lot*, granted *E Lun* in 1673, also an act of assembly passed in 1782, for an addition to Baltimore town, reciting, that J E H had set forth that he was seized and possessed of *Lun's Lot*, &c. The act directed that *Lun's Lot* should be laid out and form a part of that town; also evidence that lot No. 687 was part of *Lun's Lot*, so claimed by J E H, and laid off into a town, and that the lot was conveyed by J E H to H D, who possessed it from 1792 to 1795, when he conveyed to A B, who also possessed it until 1802, when he became a bankrupt,

- and it was conveyed to the lessors of the plaintiff. *Held*, that the plaintiff had no right to recover, there being no title deduced from the grantee of *Lun's Lot* to J E H, and there being no possession proved in A B, and those under whom he claimed, sufficient to entitle the plaintiff to recover without showing title. *Ib.*
10. In an action of ejectment it is incumbent on the plaintiff to show a grant of the land from the Proprietary. To prove such grant, he must produce the grant, or a copy under seal. This is the general rule, and must be generally adhered to. The cases in which this general rule has been deviated from, and in which secondary evidence has been resorted to for presuming a grant, rest on strong facts and circumstances, evincing an equitable right to the land—an incipient title from the Proprietary, and length of possession in conformity thereto—mesne conveyances and wills, transmitting the right from the taker up to the plaintiff. *Cockey's Lessee v Smith*, 20
11. — The producing the grant is the first step in deducing title; if that is wanting, and inferior testimony is resorted to for presuming a grant, the foundation must be laid by stating and combining all the facts and circumstances existing in the case, on which the court are to direct the jury to presume and find a grant. *Ib.*
12. — To repel the plaintiff's title the defendant must produce an antecedent grant, or give evidence that such grant had existed; or show an incipient title, or proof that the records of the land office were lost or destroyed, and show a rightful possession accompanying his, the defendant's title. *Ib.*
13. — Length of possession is the great and leading fact in presuming grants and deeds, and without which no grant or deed can be presumed. *Ib.*
14. A deed from C to F, (under whom the defendant claimed,) for land which did not appear to have been ever granted, was offered in evidence, with the receipt of the alienation fine endorsed thereon, and there was no evidence that C was ever in possession of the land — *Held*, that if C was ever in possession he was an intruder, and his deed could not operate to transfer any right to the land; and the entry and possession of F was an intrusion, the land being vacant; and that the deed from C to F, and the certificate of the receipt for the alienation fine endorsed on it, are not legal and competent evidence. *Ib.*
15. It is the exclusive right of the court to decide on the legality and competence of all testimony offered to the jury—*Held*, that the court below erred in allowing two papers, purporting to be copies of certificates of surveys of two tracts of land, to be read in evidence, the said papers not having been certified by the register, under the seal of the land office, and the same being without date; and the court below having referred the same to the jury to determine whether they were genuine or not. *Ib.*
16. It belongs to the court to determine on the legal sufficiency of facts and circumstances which will warrant the jury in presuming and finding a grant. *Ib.*
17. Where the proof was insufficient in law for the court to direct the jury to presume a grant of the land in question from the Proprietary. *Ib.*
18. The recital in a grant of the date of the certificate of survey, upon which the grant was founded, is not sufficient evidence of the time when the survey was made. *Henderson's Lessee v Parker*, 117
19. Where a grant of a tract of land issued after the time of the demise laid in a declaration of ejectment for the same land, and *after* the action of ejectment was brought, reciting the date of the certificate of survey to be *prior* to the bringing the action, it was held that the grant was not sufficient evidence of title to support the action, without producing the certificate of survey upon which the grant issued. *Ib.*
20. If the term of a demise in the declaration in an action of ejectment, expired before the verdict and judgment in the court below, the judgment is erroneous, and on appeal will be reversed. *Roseberry & Stevens v Seney, et al. Lessee*, 228
21. — In such a case the court below, under a *procedendo* directing a new trial, may enlarge the term of the demise. *Ib.*
22. The plaintiff in ejectment gave in evidence a certificate of survey of the land for which the action was brought, called *Notlar's Desire*, made for N C in 1685, without showing a patent for the land; also a deed from R C to M F, dated in 1729, for part of a tract of land called *Notley's Desire*. — *Held*, that the deed could not be read in evidence. *Ib.*

23. In 1748 a tract of land called *C* was granted to *A D*, who in 1756 conveyed a part of that tract by courses and distances to *S D*. In 1757 *A D*, being in possession of a tract of land called *R*, granted to *J R* in 1685, conveyed a part of that tract by courses and distances to *J D*. Part of the land in the first mentioned deed was included in that part of the tract called *R*, which was conveyed to *J D*. In ejectment brought for the tract called *C*, there was proof of 60 years possession and upwards, by *A D*, *S D*, and the lessor of the plaintiff, of the land located by the plaintiff on the plots; also proof of upwards of 60 years possession by *J D*, and the defendant, of the tract called *R*, for which defence was taken — *Held*, that if it is proved to the jury that the defendant, and those under whom he claims, held and claimed the land in dispute under *A D*, from whom the conveyances were made in 1756 to *S D*, and in 1757 to *J D*, then there is competent legal proof to satisfy the jury that *A D*, at the time of making the conveyance to *S D*, had a good and sufficient legal title to the tracts of land called *C* and *R*, and that the jury may and ought to presume a deed or devise to *A D* for the same, or that he held the same by descent from the person having the legal right and title thereto. *Dale v Fassett's Lessee*, 119
24. — The court refused to direct the jury in the above case, that if *J D* was in possession of that part of *R* (for which the defendant took defence,) under *A D*, when a warrant to resurvey *R* was granted to *J D* and *F D*, and located by them, and for which they obtained a grant in 1751, and that possession has been regularly transmitted from *J D* to the defendant, they ought to presume a deed for the said land from *A D* to *J D*, prior to the deed from *A D* to *S D*. *Ibid.*
25. — There being no competent evidence in the above case to prove, that upon a dispute between *S D* and *J B* about their lines, they referred the same to arbitration, and a line was settled between them, the court refused to direct the jury that *S D*, and all claiming under him, are concluded by an agreement to arbitrate. *Ibid.*
26. — A lease was made by the grantee of a tract of land, for a part thereof, on the 22d of June 1765, to *J B* for 71 years, at the annual rent of £5. *J B* on the 11th of April 1775, assigned the lease to *J H* for 66 years, at the annual rent of £100, until the 24th of March 1779, and £50 for one year commencing on the 24th of March 1780, and a pepper corn annually for the residue of the term, with a clause of re-entry, &c. and a covenant to pay the rents, or vacate the premises, &c. also a covenant to pay the original lessee the annual rent of £5 during the term. *J H* entered in 1775, and continued in possession until 1780, and then left the premises. *J R* was in possession on the 26th of February 1785, claiming under the lessor of the plaintiff, and £380 being unpaid, to *J B*, he then entered, &c. under the lease of the 11th of April 1775, and possession was given up to him by *J R*. On the 13th of April 1791, *J B* leased to the defendant, who entered on the premises, improved the same, and paid taxes, &c. ever since — *Held*, that it was optional in *J H* to pay the stipulated rent according to the lease, or to vacate the premises. The interest which *J H* had in the lease could not be vacated or transferred to *J B*, by the facts stated. His interest in the land being for a term exceeding seven years, could not be transferred by him otherwise than in the way prescribed by the act of 1766, *ch.* 14, and no acts *in pais* were competent to that purpose. His liability to pay the rent would continue until some act was done by him legally operative to vacate the premises. *Peter v Schley's Lessee*, 211
27. Where the facts stated did not, in the opinion of the court, amount to an abandonment and vacation of the premises leased, the court will not leave it to the jury to say that such facts were evidence of an abandonment and vacation of the premises. *Ib.*
28. If a deed from *H* to *N* for part of a tract of land, has been located on the plots, then a deed from *H* and *N* to *J* for the same part of the tract of land, need not also be located. *Roseberry & Stevens v Seney, et al. Lessee*, 223
29. *N H* by his will in 1729, devised his dwelling plantation, called *M's Lot*, and his new plantation called *H's Addition*, to his wife *F*, for life, with remainder in tail to his son *H*. In 1771 a common recovery was suffered by *H* for docking the estate tail vested in him in the said lands, and for limiting and assuring them to the use of *J E. F*, the wife of *N H*, was alive and in possession of the lands at the time the

common recovery was suffered, and continued in possession until her death, which happened after the death of J E, and J E, and those claiming under him, were also in possession of the lands during the life of F—*Held*, that the common recovery suffered by H was defective, there being no legal surrender of the life estate; and that the facts and circumstances disclosed were not a sufficient foundation whereon to presume that there had been a surrender of the life estate of the tenant for life. *Carroll's Lessee v Maydwell et al.* 292

30. — *Held* also, that the deed of 1771, for leading uses for suffering the common recovery, and vesting the estate in J E, did not pass to and vest in J E, a base fee simple in the lands, notwithstanding H being dead, and though there was no proof of entry into the lands, or action to claim therefor by his issue, or any person claiming under them. *Ib.*

31. — *Held* also, that the deed of confirmation in 1789 by H to M, who was appointed by an act of assembly, a trustee of J E, an idiot, son of J E, and the deed in 1794 by M to the lessor of the plaintiff, were operative in law to vest in the lessor of the plaintiff an estate in fee simple in the lands. *Ib.*

32. An amendment may be made to a declaration in ejectment so as to change the demise from a joint one by all the lessors to separate demises for undivided portions. *Hutchings v Talbot et al. Lessee.* 378

33. The change of the name of the fictitious lessee in the amended declaration is of no consequence, the defendant having afterwards appeared to it and entered into the common rule. *Quere.* If it is not then to be considered as a new action? *Ib.*

34. A deed executed by certain persons, stating themselves to be commissioners appointed to preserve confiscated *British* property, to certain purchasers of such property, is sufficient to vest a title in the purchasers so as to enable them to support an action of ejectment for a recovery of the land conveyed. *Ib.*

35. Where the lessor of the plaintiff, in an action of ejectment, died pending the action, and his devisees, claiming *undivided portions* in the land, were made a party to such action. *Dorsey v Courtenay et al. Lessee.* 480

36. B G, being seized of a part of a tract of land, died intestate, leaving six children his heirs at law, one of whom conveyed all his right, &c. to J H, who conveyed one moiety thereof to J P. An ejectment, on the joint demise of J H and J P, to the plaintiff, and on separate demises by each of them, for an undivided moiety of such part, was brought. The death of J P was suggested after the issue was joined, and a verdict was rendered for the plaintiff for one undivided twelfth part of the land for which the ejectment was brought, described by lines on the plots. A motion in arrest of judgment was overruled, and judgment rendered on the verdict for the plaintiff. *Stevenson v Howard surv. of Punnington's Lessee.* 554

37. The plaintiff in ejectment in deducing his title to the land in question, gave in evidence a grant for the land in 1671 to T P and R B, and that T R was seized and possessed of the land, and died so seized in 1746, having by his will in 1744 devised the land in tail to his son F R, after his mother's death. F R, in 1780, being in possession, conveyed the land to B G, who died intestate in 1800, leaving six children, one of whom conveyed all his interest to the lessor of the plaintiff—*Held*, that the life estate set up to defeat the action, must, from the length of time that had elapsed, (1746 to 1808,) be considered as having expired before the ejectment was brought, and that the plaintiff was entitled to recover. *Ib.*

See Commission & Commissioners 2.

- Composition Money 1, 2.
- Deposition 2, 3, 4.
- Evidence 20, 33, 34, 42, 43, 47.
- Exchange 2.
- Grant 5, 6, 7, 8, 9.
- Parol Evidence 4, 5, 6.
- Presumption 6, 7.
- Warrant of Resurvey 1.

#### ENDORSEE & ENDORSOR.

1. A subsequent endorser of a bill of exchange discounted for the accommodation of the drawer, can recover against a prior endorser, the whole amount paid by him to the holder of the bill. See *BILL OF EXCHANGE* 1, 2, 3, 6, and *Wood v Repold.* 125

#### ENDORSEMENT.

- See Arbitration & Arbitrators 1.
- Bill of Exchange 2, 3, 4.
- Bill of Sale 1, 2.

See Endorsee & Endorsor.  
— Evidence 7.

### ENROLMENT.

See Bill of Sale 1.  
— Evidence 7.

### ENTRIES.

See Evidence 28.

### ENTRY.

See Mesne Profits 1.  
— Trespass 7.  
— Vacant Land.

### EQUITABLE ACTION.

See Corporation 2.

### EQUITABLE ASSIGNMENT.

See Cestui Que Use.

### EQUITABLE ESTATE.

See Presumption 6, 8.

### EQUITABLE INTEREST.

See Evidence 34.

### EQUITY.

See Court of Chancery.

### ERASURE.

See Assumpsit 4.

### ERROR.

1. If the pleadings in a record transmitted to the court of appeals by writ of error, are entered short in the record, the judgment must be reversed. *Scholls v Shriner*, 490  
See Court of Appeals 8.  
— Inquiry of Damages 1.

### ESCAPE.

2. In an action on a sheriff's bond for a voluntary escape of a debtor committed to the custody of the sheriff under an execution—*Held*, that if the sheriff appointed the dwelling-house of the debtor as his prison, and the debtor was there confined, and his dwelling house was not part of the public gaol and prison of the county, and was not within the prison walls and prison bounds of the gaol, there was proof of a voluntary escape. *Jones v The State use of Orr*, 559.

### ESTATE FOR LIFE.

1. J O by his will, devised to his wife A his dwelling plantation during her life, and after her decease to fall to his son L, and if he should die under age, the land should fall to his son C, and his

daughter A—*Held*, that L took only an estate for life. *Owings v Reynolds, et al. Lessee*, 141

2. Where a life estate was set up to defeat an action of ejectment, it was held that the life estate must, from the length of time that had elapsed, (1746 to 1808,) be considered as having expired before the action was brought. See EJECTMENT 37, and *Stevenson v Howard, surv. of Pennington's Lessee*, 554

See Devise 5, 7.

— Ejectment 29, 37.

### ESTATE TAIL.

1. An heir or issue in tail, claiming *per formam doni*, is not compellable to fulfil a contract entered into by the tenant in tail for a sale of the entailed land. *Partridge v Dorsey's Lessee*, 320, 321

See Court of Chancery 14.

— Devise 5, 8.

### ESTOPPEL.

See Court of Chancery 15.

— Ejectment 25.

— Mesne Profits 1.

— Tenant in Possession 1.

— Terretenant 1, 3.

— Trespass 1.

— Verdict 1, 3.

### EVIDENCE.

1. The plots returned in an action of ejectment are a part of the record, and one of the original plots, or a copy, ought to be annexed to an exemplification of the proceedings to make it evidence. *Orndorff v Mumma*, 70
2. A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can, from the nature of the case be had. *Patterson v The Maryland Insurance Co.*, 74
3. In an action on a policy of insurance, in order to prove the several matters alleged in the declaration, the plaintiff offered to read in evidence a protest made by the captain and others, of the vessel, on her return, before a notary public in Baltimore—*Held*, that the protest was merely a voluntary affidavit; and a notary public, except in those cases where a protest by *lex mercatoria*, or by statute, has no authority to take a protest. *Id.*
4. — The protest of the captain is not the best evidence the nature of the transaction admits of. It is not to be con-

- sidered as a deposition *de bene esse*; and it cannot be used as *prima facie* evidence only, which is equally as objectionable as if used as positive proof; for it would throw the *onus probandi* on the opposite party. *Ib.*
5. If a commission issues to a foreign country to take testimony, and the commissioners in their return certify that they had taken the oath annexed to the commission, and at the foot of such oath are written the names of two persons, before whom it purports to have been taken, the commission and testimony taken thereunder may be read in evidence. *Wilson v Mitchell* 91
6. The plaintiff cannot take a judgment on a count in his declaration upon which he had given no evidence. *Ib.*
7. An instrument of writing, purporting to be an original bill of sale of personal property, and to have been signed and sealed by the vendor therein named, and by him duly acknowledged before a justice of the peace, with an endorsement thereon, proved to be in the hand-writing of a person accustomed to write in the clerk's office of the county, stating that the instrument of writing had been duly recorded in the land records of the county.—*Held*, that it was sufficient evidence. *Ayres v Grimes*, 95
8. A free black person is an incompetent witness to give evidence in a case where the parties are free white christians. *Rusk v Sowerwine*, 97
9. A witness proved that he received a power of attorney from a person to act for her in all things relating to her estate, as well in collecting debts, as in making sale of property, &c.—*Held*, that unless the original power of attorney was produced, or proved to be lost, or that the party had issued a *subpena* to the witness with a *duces tecum*, no evidence could be given of it. *Ib.* 98
10. No evidence can be given of the location of a deed, plot, &c. on the plots in an action of ejectment, which does not correspond with it. *Hughes's Lessee v Howard*, 9
11. Where the defendant in ejectment produced and read certain proceedings, which were variant from the location made by him on the plots, without objection being made to the legality of the evidence, it cannot render the same legally admissible when offered by the plaintiff. *Ib.*
12. The proceedings of the commissioners of bankruptcy are not legally admissible as evidence to prove the act of bankruptcy committed by the bankrupt—the proceedings being *res inter alios acta*, and not evidence according to the principles of the common law, and not made evidence by the laws of the *United States* which relate to this subject. *Wood v Grundy et al. Lessee*, 13
13. Where it appeared by the evidence of the plaintiff's title, that it accrued subsequent to the time of the demise laid in the declaration in ejectment, he could not recover. See EJECTMENT 7, and *Ib.*
14. It is the exclusive right of the court to decide on the legality and competence of all testimony offered to the jury. *Cockey's Lessee v Smith*, 20
15. It belongs to the court to determine on the legal sufficiency of facts and circumstances which will warrant the jury in presuming and finding a grant. *Ib.*
16. Where there was no grant produced of the land, for which the defendant took defence in an action of ejectment, and no evidence that C, who conveyed it to F, under whom the defendant claimed, was ever in possession.—*Held*, that the deed, and the receipt for the alienation fine, shown from the record book, as endorsed on that deed, are not legal and competent evidence. *Ib.*
17. Where the court below allowed the defendant in an action of ejectment to read in evidence two papers purporting to be copies made by a former register of the land office, his hand-writing being proved, of certificates of surveys of two tracts of land, one surveyed in 1695, and the other in 1710, for which the defendant took defence, certified (without date, but supposed to be between 1746 and 1759, and not under seal,) to have been copied from particular record books of that office, but which books, could not be found in the office, and there being no evidence of the loss of any of the records of that office.—*Held*, on appeal, that the court below erred in allowing the two papers to be read in evidence, the same not having been certified by the register under the seal of the land office, and the same being without date, and the court below having referred the same to the jury to determine whether they were genuine or not. *Ib.*

18. The recital in a grant of the date of the certificate of survey upon which the grant was founded, is not sufficient evidence of the time when the survey was made, to support an action of ejectment for the same land, brought before the date of the grant, but subsequent to the recited date of the survey. *Henderson's Lessee v Parker*. 117
19. The whole correspondence between the parties on the subject of referring to arbitrators matters in dispute between them, or their contents, may be given in evidence; but if not produced, the jury are not to presume, that if produced the correspondence would operate against the party not producing it. *Walsh v Gilmer*, 387, 391
20. A bond executed in 1759 by a person then claiming the land in dispute, jointly with another person, conditioned to abide by a division which certain persons should make of the land, was permitted to be read in evidence by the plaintiff in ejectment, where the defendant claimed under the obligor in the bond. *Dale v Fassett's Lessee*, 119
21. In assault and battery the defendant pleaded *non cul* and *son assault demesne*, and in mitigation of damages offered to give in evidence that the plaintiff had grossly abused two persons, friends of the defendant; and to prove the abuse against them untrue and false, offered to give evidence of the quarrel, and the original cause thereof between the plaintiff and the defendant's friends, which happened some time anterior to the assault and battery.—*Held*, that the evidence was inadmissible. *Anderson v Johnson*, 162
22. The admissions of the assignor of a bond made subsequent to the assignment, of payments in part of the bond having been made to him, are admissible in evidence. *Thomas's Ex'x. v Denning*, 242
23. In replevin for a negro, where the act of limitations was relied on by the defendant, the plaintiff, in order to prevent the operation of that act, proved by a witness, that the defendant, after the institution of the suit, said "that if the negro did not belong to him, he did not want him, and no property he had was his, and that no law suit was necessary." The competency of the witness was objected to, and evidence was given that he had sold the said negro to J W, under whom the defendant claimed him, by a bill of sale dated in 1792, with a general warranty; but it was proved that the witness was in that year discharged under an insolvent law.—*Held*, that the witness was competent, and the evidence was permitted to be given to the jury. *Quimby v Wroth*, 595
24. In debt on a guardian's bond, it was held that the accounts of a guardian rendered to, passed and allowed, by the orphans court, were not conclusive evidence either on the guardian or his ward, but *prima facie* evidence only of the balances respectively due by the guardian to his ward at the several times when the accounts were passed and allowed, and were open to examination by the court and jury; and that the plaintiff might give other evidence to show that the accounts were erroneous, or that the orphans court had exceeded their authority, or had made improper or unreasonable allowances to the guardian in the accounts. *Spedden v The State use of Marshall, et al*. 251
25. In replevin by W's executor against E's administrator for a negro boy, the defendant, for the purpose of proving a gift of the negro boy by W to J, whose administratrix E was in her lifetime, offered in evidence K, the wife of B, which K was the daughter and one of the representatives of J and of E, and to restore her competency, offered in evidence a receipt given by B to E as the administratrix of J, for his wife's share of her deceased father J's estate.—*Held*, that K's testimony was inadmissible. *Dunnington's Ex'r. v Dunnington's Adm'r*. 279
26. A copy of the qualification of G D as one of the commissioners, to preserve confiscated *British* property, purporting to have been made before W H, a justice of the peace, certified by the auditor general as a true copy taken from the original filed in his office; and a copy taken from the proceedings of the said commissioners, stating that G D, appointed a commissioner, &c. produced a certificate of his qualification, &c. certified as above: with the testimony of a witness, that he had examined that part which purports to be the qualification of G D, and that it is a true copy of the original, in the hand-writing of G D, and that the name of W H, signed thereto, was in the hand-writing of the said W

- H, and that the other copy was a true copy from the journal of proceedings of the commissioners, &c. admitted to be read in evidence. *Hutchings v Talbot et al. Lessee*, 378
27. A deed executed by certain persons, stating themselves to be commissioners appointed to preserve confiscated British property, to a purchaser of such property, is sufficient to vest a title in the purchaser, so as to enable him to support an action of ejectment for a recovery of the land conveyed. *Ib.*
28. As to what is legal evidence of sale made at auction. The entries made by a clerk to the auctioneer are not the best evidence. *Walsh v Gilmor, et al.* 395, 399
29. The testimony of a witness as to the contents of a letter, who had never seen the person write who wrote the letter, and had no knowledge of his hand-writing, is inadmissible. *Dorsey v Dorsey's Heirs & Ex'rs, et al.* 426
30. The declarations of a man respecting his title to lands, made before he parts with his estate therein, are evidence against him, and all claiming under him. *Ib.*
31. J W obtained a judgment against J D, and issued a *scire facias* thereon against R S, as his terretenant, who pleaded that J D was not seized of the land of which he is returned tenant, at the time of the judgment.—*Held*, that the *scire facias* could not be supported without the production of a grant from the Proprietary for the land, or laying a sufficient foundation for presuming one. But that a grant for the land, with the deed offered in evidence, from J D to R S, and the parol evidence that J D was, and had been in possession of the land for nine years before his deed to R S, would be sufficient to support the issue for the plaintiff. *Saunders, terret. of Duley v Webster*, 432
32. Copies of original leases granted by the agents of the Lord Proprietary, remaining in the auditor's office, with the affidavit of the auditor-general, stating that they were true copies taken from the originals, made before a justice of the peace, with a certificate of the clerk of the county court that such person was a justice, &c.—*Held*, to be competent evidence. *Bradford's Lessee v McComas et al.* 444
33. A paper purporting to be field notes or courses of the survey of a parcel of land called C C, proved to be in the hand-writing of J F, who was accustomed to survey lands in the early part of the last century, and who originally surveyed C. Manor, was offered as evidence of its ancient running.—*Held*, by the county court, that the paper could not be used in evidence for that purpose. *Ringgold v Gallo-way et ux. Lessee*, 455
34. T D in 1768 executed a deed of trust to M and H, authorising them, among other things, to convey to C S a lot of ground No. 38, in payment of a debt due by T D to C S, in case he consents to accept, &c. in six weeks from the date thereof. On the 20th of September 1790, the chancellor, on behalf of the state, conveyed lot No. 38 to M and H, reciting in his deed that the commissioners of confiscated British property sold the said lot to J D, who sold and conveyed it to T D, and that T D had conveyed it to M and H, &c. J D, L W, S C and T D, in 1782, executed 23 bonds to the state, under the act of May 1781, ch. 33, for property by them purchased of the state. J D, with T D and E N his sureties, in 1781 passed their bond to the state, which bond was released by the state to E D, the executrix of T D, by the act of 1791, ch. 54. Process of *feri facias* issued in 1788, in conformity to the act of May 1781, ch. 33, on the 23 bonds executed by J D, and others, in 1782. T D died in 1790, and by his will devised his whole estate, real and personal, to E D, and appointed her his executrix. T D died insolvent, without leaving sufficient property to pay his debt due to the state; and J D, L W and S C, were insolvent, regularly discharged under the insolvent law, after the date of the above bonds, and before the death of T D. In 1790 the legislature by a resolution directed the treasurer to cancel all bonds given to the state by J D, E N and T D, and by J D, L W, S C and T D. By the act of 1791, ch. 54, the legislature declared that their intention, by the above resolution, was to benefit E D, and her children, and not the creditors of T D, or any other person; they repealed the resolution, and directed the treasurer to receive the bonds, and to deliver them to E D to her use, after having acknowledged and endorsed on each bond, satisfaction received by the state from her for the sum due on

- each bond; and that she should stand in law and equity in the place of the state. The act was complied with by the treasurer. Under the will of T D, and the assignment of the said bonds, E D entered into possession of the lot No. 38, before mentioned. C S, mentioned in the deed of trust from T D to M and H, brought suit against T D for the debt due to him, and recovered judgment in 1788. He sued out a *scire facias* thereon against E D, as executrix of T D, and obtained a *fiat* in 1794. C S in 1794 filed a bill in chancery against M and H, to compel them to execute the trust mentioned in the deed to them from T D, by conveying to him the lot No. 38, and for which purpose a decree passed—*Held*, that the record and decree could not be read in evidence in an action of ejectment brought by the lessee of J S against E D, for the recovery of the said lot.—*Held*, also, that the decree of the chancellor, together with the deed from M and H to J S, the lessor of the plaintiff, reciting an assignment of the decree by C S to J S, was not sufficient evidence of a due execution of the trust in the deed from T D to M and H. *Dorsey v Courtenay, et al. Lessee*, 474
35. If A, as surety of B, pays a debt due to C, on proof of the payment, A could recover of B, and an oral or written acknowledgment by C of the payment, would be evidence in a suit against B. *Prather v Johnson, et al.* 490
36. When an act of assembly directs that the certificate of a public officer is to be evidence, a paper produced with his name will be evidence *prima facie*, unless the name is proved not to have been signed by him—as where a paper purporting to be an account made by T H as treasurer, and signed by him, and by him sworn to before a justice of the peace, with a certificate of the clerk of the county that such person was a justice, &c. it was permitted to be read in evidence under the act of 1798, ch. 103. *Ib.*
37. A free mulatto man, whose mother was a free black woman, but descended in the female line from a white woman, was permitted to give evidence in the case of a negro petitioning for his freedom, against a free white christian person. *Sprigg v Negro Mary*, 491
38. A witness deposed that she hired E, the mother of a petitioner for freedom, from T S, in 1810, for one year, who informed her he intended E for M H, and after the death of T S she paid the wages to C H, who brought an order from the defendant, which order was expressed to be for the use of M H. That about the time the witness hired E, on her advising T S to hire E to her husband, who was a free man, he objected, and said he had no thought of hiring her to any body, but he would talk with his wife, and if on consulting her she thought it advisable, the witness might have E, and a few days after the defendant informed her she could have E for \$24 per year—*Held*, that the testimony of the witness was legally admissible in evidence. *Sprigg v Negro Presly*, 494
39. To show that B P was in 1797, at the time a judgment was rendered against him, seized of the land of which the defendant was, on a *scire facias* issued on the judgment, returned tenant, evidence was given of a devise of the land to B P in 1766 by his father, who had been in possession a considerable time before his death; also a conveyance by B P to J L in May 1799; also a conveyance by J L to J H in June 1799, and a conveyance by J H to the defendant in 1801—*Held*, that such evidence was not sufficient to prove a seizin in B P in the land in question at the time the judgment was obtained against him. *Ford, terret. of Preston v Gwinn's Adm'r.* 496
40. A bill of sale executed by C H to C S, both of Washington county, in the District of Columbia, on the 26th of December 1804, for sundry slaves, to secure the payment of a debt due to C J, and acknowledged on the same day before two justices of the peace of that county, and recorded on the 10th of January 1805 in the records of said county—*Held*, that a copy thereof, certified under the seal of the court by the clerk of the circuit court of the said District for the said county, with the certificate of the chief judge of the said court, that the attestation was in due form, and also a certificate by the said clerk, under the seal of the court, that the said chief judge was duly commissioned and qualified, was legal evidence. *Bruce's Adm'r. v Smith*, 499
41. In an action on a replevin bond, executed on suing out a writ of replevin for negro slaves, which writ was non prosed, and the plaintiffs in

this action were kept out of the negroes from May 1804 to March 1805. The defendant, in order to show the declarations of the plaintiffs, that the slaves were of little or no value, offered to ask a witness the following question: "Did you hear the plaintiffs, at any time in October 1809, say that they knew where the negroes were, that they had left their possession by their orders, and that they would take no steps to regain the possession of them, and that they did not wish, and would not allow them to return?"—*Held*, that the question was inadmissible, and should not be answered. *Pye v Woods et ux.* 504

42. Depositions taken under a warrant of resurvey issued in a former action of ejectment, and returned by the surveyor with the plots, are, on the death of the witnesses, evidence against the parties to the suit, and all claiming under them. *Stewart et al. Lessee v Mason,* 507

43.—Such depositions, tho' dated a day after the date of the execution of the warrant, will, if returned with the plots, be considered *prima facie* as having been taken on the survey. *Ib.*

44. The time when a certificate of survey was returned to the land office, and when the caution money was paid, are facts for the decision of the jury. *Ib.* 528, 531, 534

45. The Proprietary instructions are evidence when applicable. *Ib.* 528

46 Evidence that the certificate of an elder survey was in the land office when a junior survey was made and an elder grant thereon obtained, is for the decision of the jury. *Ib.* 528, 531, 534

47. The defendant in an action of ejectment, having read in evidence a grant of the land in dispute to M G in 1708, proved that T F was in possession of part of the land from 1765 to the time of his death, and that those claiming under him had been in possession, ever since, and that the defendant was the only heir of T F. He then, without showing any title or possession in J C, offered to read in evidence a deed for the said land from J C to T F, in 1765, for the purpose of proving in what manner and at what time T F came into possession of the land—*Held*, that for such purposes the deed might be read in evidence. *Cockey et al. Lessee v Smith* 552

*See* Award 1, 2, 5, 7, 8.  
— Bill of Exceptions 2.  
— Bill of Exchange 4, 5.  
— Bill of Sale 2.  
— Bond 2.  
— Certificate of Survey 1.  
— Commission & Commissioners 2.  
— Contract 3.  
— Court of Chancery 18.  
— Covenant 1, 5.  
— Direction.  
— Ejectment 9, 22, 23, 24, 25, 28, 37.  
— Escape 1.  
— Estate For Life 2.  
— Gift 1.  
— Grant 1.  
— Mesne Profits.  
— Orphans Court 3.  
— Parol Evidence.  
— Presumption 7.  
— Promissory Note 5, 7, 8.  
— Slander.  
— Surety 2.  
— Trespass 1, 3.  
— Usury.  
— Variance.  
— Verdict.  
— Waste.  
— Witness.

#### EXCHANGE.

1. Whether or not lands will pass by a parol exchange? *Quere.* *Carroll's Lessee v Maydwell, et al.* 292
2. An exchange of lands cannot be proved by parol evidence. *Maydwell, et al. Lessee v Carroll,* 361

#### EXECUTION.

*See* Capias ad Satisfaciendum.  
— Fieri Facias.

#### EXECUTORS & ADMINISTRATORS.

1. If an executor compounds debts due on mortgages or deeds of trust, with the creditors of the deceased, he shall take no benefit of the composition to himself. *See* COURT OF CHANCERY 8, and *Turner v Bouchell's Ex'r, et al.* 99
2. In an action on an administration bond, executed by an administrator *D. B. N.* brought to recover a legacy, the defendant rejoined to the replication assigning breaches, that the writ issued before the expiration of 12 months from the date of the letters of administration. A demurrer thereto was ruled good. *Mann v The State use Thomas,* 237
3. A S by his will in 1775, bequeathed a legacy to E W, to be paid to her on

her day of marriage, and made G M his residuary legatee and executor, who returned an inventory in 1776, and settled an account with the orphans court, leaving a large balance due to the estate. After the death of G M, letters of administration D B N were granted to A M, who returned no inventory, nor settled any account, but it was proved that sundry slaves, included in the inventory returned by G M, after his death came to the hands of A M. On an action brought against A M on her administration bond to recover the legacy bequeathed to E W—*Held*, that the above testimony was sufficient to support the issue joined on the part of the plaintiff, to the rejoinder of no assets. *Ib.*

4. In an action on an administration bond given by J G, as administrator D. B. N. of J C, of the goods unadministered by E C, the former executrix, to the plaintiff's replication that there remained in the hands of J G £217 17, clear personal estate, after payment of debts, due and payable to A, the daughter of J C, the defendant rejoined that E C did, as the guardian of A, receive, and as executrix of J C did pay and satisfy to herself, as guardian of A, the said sum of £217 17. Demurrer thereto ruled good; but on appeal reversed. *Downes v The State use of Tilden, et ux.* 239

5. — Where the balance due on an account passed by E C, as executrix of J C, was £277 14 1, and the amount of the inventory returned after the death of E C, by J G as administrator D. B. N. was £214 2 6, the county court refused to direct the jury that the sum of £63 11 7, the difference between those two sums, is to be taken as part payment to E C of her one third share of the personal estate bequeathed to her by J C. *Ib.*

6. A court of law is not concluded by an account settled and passed by an administrator with the orphans court, from investigating and judging of the propriety of the disbursements therein stated. *The State use of Sappington, et ux. v Massey*, 276, (note.)

See Court of Chancery 12.

#### EXEMPLIFICATION.

See Evidence 1, 40.

#### EXTINGUISHMENT.

See Award 3.

— Court of Chancery 8.

See Estate for Life 2.

— Lease 1.

— Release 1.

#### F.

##### FACTOR.

1. Where a factor had endorsed bills of exchange for his principal, this liability, with a reasonable apprehension of danger, gave him, as factor, a lien on a bill then in his hands belonging to his principal, to meet the event of his endorsements; and the fact of the factor's receiving a commission on the endorsement of bills, is not viewed as in any way affecting the general question as to his lien as factor. *Hodgson v Payson & Lorman*, 339

##### FACTS.

See Ejectment 26, 27.

##### FALSIFY & SURCHARGE.

See Court of Chancery 1.

##### FEE SIMPLE.

See Devise 3.

— Ejectment 31.

##### FEME COVERT.

1. Independent of the acts of assembly of 1715, *ch. 47*, 1752, *ch. 8*, and November 1766, *ch. 14*, there was no legal mode by which a *feme covert* could transfer her interest in land, but by common recovery or fine. *Lawrence et ux. v Heister et al.* 377
2. By the act of 1715, *ch. 47*, a *feme covert*, if she is named as grantor in a deed of bargain and sale, may be barred of her lands if she acknowledges the deed in the manner prescribed by that act, but her husband must also be a grantor in the deed. *Ib.*
3. The act of 1766, *ch. 14*, is more explicit than the act of 1715, *ch. 47*, and shows, that where the interest of the *feme covert* is to be conveyed or barred, she must join with her husband in the conveyance intended to pass her interest, and the conveyance must be acknowledged by the husband. *Ib.*
4. To pass the interest of the wife in her land, the husband and wife must join in the deed as grantors, and the deed cannot be legally sufficient and operative to pass her interest, unless it is acknowledged by the husband, *Ib.*

See Conveyance 1, 3.

FEME SOLE.

See Court of Chancery 16, 17.

FIELD NOTES.

See Evidence 33.

FIERI FACIAS.

1. An action of trespass *vi et armis* will lie against a sheriff for seizing under a *fiери facias*, and selling slaves which had been, by a bill of sale duly executed, acknowledged and recorded, in the county of *Washington*, in the District of *Columbia*, transferred by the defendant in such execution to a *bona fide* creditor, although such slaves remained in the possession of such defendant. See *BILL OF SALE*, 3, and *Bruce's Adm'rs. v Snath*, 499  
See Attachment 1.  
— Bill of Sale 2.

FINE.

See Feme Covert 1.

FORMER RECOVERY.

See Court of Chancery 22.  
— Deposition 2.  
— Pleading 4.

FORMULA.

See Administration Bond 1.

FRAUD.

See Bankrupt & Bankruptcy 2, 3.  
— Bill of Sale 2.  
— Lottery 1.  
— Warranty 1.

FREEDOM.

1. A petition for freedom is comprehended within the general terms of suits or actions, in the *second* section of the act of 1804, *ch. 55*, relative to their removal from one county court to another; but a negro petitioning for his freedom is not competent to make the affidavit required by that act—his slavery or freedom being then *sub judice*, and if a slave he is excluded by the act of 1717, *ch. 13*. See *REMOVAL OF CAUSES* 1, and *Queen v Neale*, 158
2. Where the mother of a petitioner for freedom was born in this state the slave of T S, and was held by him in slavery until 1804, when he suffered her to be carried to the county of *Washington*, in the District of *Columbia*, by C H, where she continued employed by, and residing with, C H, for two years, when she was sent back to this state to T S. The petitioner was born in the county of *Washington*, in the Dis-

trict of *Columbia*, while her mother was there, and brought with her mother into this state, and has continued here.—*Held*, that the petitioner was entitled to freedom. *Sprigg v Negro Mary*, 491

3. A free mulatto man, whose mother was a free black woman, but descended in the female line from a white woman, was permitted to give evidence in the case of a negro petitioning for his freedom against a free white christian man. *Id.*
4. A negro slave belonging to an infant, and brought into this state subsequent to the act of 1796, *ch. 67*, by the father and natural guardian of such infant, is not entitled to freedom. *Id.*
5. A petitioner for freedom, being the slave of T S of this state, was, when about three years of age, carried, with the permission of T S, to the county of *Washington*, in the District of *Columbia*, by C H, in 1804, where he continued employed by, and residing with C H, for two years, when he was sent back to this state to T S, with whom he continued to reside and to be employed until the death of T S in 1810—*Held*, that the petitioner was entitled to his freedom. *Sprigg v Negro Presly*, 495
6. The guardian of a minor importing into this state, contrary to law, a slave belonging to the minor, will not entitle such slave to freedom; nor will the assent of the minor, during his minority, give such title. *Haney v Waddle*, 557
7. J L, a married man, a native of *St. Domingo*, flying from the dangers which existed there, removed to this state in 1793, bringing with him three negroes, whom he had before and then owned as slaves. In 1794 he sold one of them as a slave to W C, who sold him to R F. J L continued to reside in this state until 1796, when he returned to the *West Indies*. The negro thus sold petitioned for his freedom against R F.—*Held*, that he was entitled to freedom. *Fulton v Lewis*, 564

FREE NEGROES & MULATTOES.

1. A free black person is an incompetent witness in a case where the parties are free white christians. *Rusk v Souerwine*, 97
2. A free mulatto man, whose mother was a free black woman, but descended in the female line from a white woman, was permitted to give evidence

in the case of a negro petitioning for his freedom against a free white christian person. *Sprigg v Negro Mary*, 491

### FREIGHT.

1. In replevin for tobacco, it appeared that an agreement was entered into between A M and H G, to execute a charter party for a vessel, the defendant captain, from B to A, but which charter party was not executed. That H G put the tobacco on board the vessel, and afterwards sold it to the plaintiff, and gave an order for it on the defendant, who refused to deliver it, but insisted that the cargo should be completed, and the vessel should proceed to perform the voyage, and that the freight should be paid, both of which H G, and the plaintiff, refused to do—*Held*, that the defendant had no lien on the tobacco for freight—no freight being in fact due before the commencement of the voyage; and that if an injury had been sustained by the owner of the vessel, in consequence of a violation of the contract on the part of H G, the proper remedy was to be sought by an action against him. *Burgess v Gun*, 225
2. In *assumpsit* by a shipper of goods against the consignee of the cargo, to recover money retained for freight—*Held*, that the plaintiff was at liberty to show the vessel not to have been seaworthy at the commencement of her voyage, in order to resist the defendant's claim to freight; and if the jury believed the vessel not to have been seaworthy, and competent to perform the voyage at the time of its commencement, that then the defendant was not entitled to retain any thing for freight, and that the plaintiff was entitled to recover the amount so retained. *Dickinson v Haslet*, 345
3. A, the owner of a vessel, caused her to be insured by B and C, (an insurance company,) on a voyage from S to L, and in the prosecution of her voyage, she was captured and carried into a British port, where the cargo was condemned, but the vessel was liberated. On an appeal, the sentence in relation to the vessel was affirmed, and freight ordered to be paid by the claimants of the cargo; and the sentence of condemnation of the cargo was reversed, and the cargo ordered to be restored to the claimants. D, the agent of B and C, received from

the claimants of the cargo the amount of the freight awarded. Immediately after the capture, A abandoned the vessel to B and C, and claimed as for a total loss, which was paid to him. He also claimed the amount of the freight received by D, the agent of B and C; and in an action of *assumpsit* for money had and received, brought by A against B and C, being a corporate body—*Held*, that the action could be maintained, and that A was entitled to all freight earned to the time of the capture; that the freight before and after the capture was susceptible of apportionment, so as to give to each of the parties the usufruct of the vessel during the time of their respective ownership. *Kennedy v Baltimore Insurance Company*, 367

### G.

#### GAOL.

See Escape 1.  
— Sheriff 2.

#### GENERAL ASSEMBLY.

1. The power and jurisdiction of the general assembly of Maryland in 1773, over all subjects of legislation within the limits of Maryland, were as great and transcendent as the power and jurisdiction of the parliament of England within the scope of their authority. Per Chase, Ch. J. in the County Court. *Partridge v Dorsey's Lessee*, 322

#### GENERAL DESCRIPTION.

1. T and E, by their deed of bargain and sale, conveyed to R "all that lot or parcel of ground, situate and lying in Baltimore Town, which is known and distinguished on the plat of said town by the No. 25, and beginning for the same at," &c. describing the same by courses and distances, "to have and hold the same, and every part thereof, unto the said R," &c.—*Held*, that the whole of the lot passed by the general description of all that lot No. 25, and was not restricted by the special description by course and distance. *Buchanan's Lessee v Stuart*, 329

See Parol Evidence 2.

#### GENERAL REPUTATION.

See Grant 7.  
— Name  
— Parol Evidence 4.

GIFT.

1. If a female negro slave was in possession of C H, and whilst she was so in possession T S, the owner of the slave, verbally gave the slave to M H, the daughter of C H, then an infant of four years old, and left the slave in the possession of C H, for the use of M H, and C H kept possession of the slave for the benefit of M H, then the said verbal gift was sufficient to transfer the property in the slave to W H, without any other delivery. *Sprigg v Negro Presly*, 495  
See Evidence 38.

GOVERNOR.

- See Court of Oyer & Terminer, &c. 1.

GRANT.

1. The plaintiff in ejectment must show a grant from the proprietary for the land for which the ejectment is brought. To prove such grant he must produce it, or a copy under seal. This is the first step in deducing title; if that is wanting, and inferior testimony is resorted to for presuming a grant, the foundation must be laid by stating and combining all the facts and circumstances existing in the case, on which the court are to direct the jury to presume and find a grant. See PRESUMPTION 1, 2, 3, 4, 5, and *Cockey's Lessee v Smith*, 20
2. Parol evidence of the surveyor, who originally located and surveyed a tract of land, calling to begin at the end of the lines of another tract, and to run to and intersect other tracts, &c. is legal and competent to prove that it began at and run to particular places described on the plots. *Tenant v Hambleton*, 233
3. If certain tracts of land called for by a junior survey, were surveyed by course and distance when the junior survey was made, then the grant on such junior survey passed no other land than was included by such survey. *Ib.*
4. A grant being made to J, and E his wife, of a lot of ground during the lives of the said J and E—*Held*, that a joint estate vested in them during their lives; and that the quality of survivorship being incident to a joint estate, or joint tenancy, without any technical or other words being necessary to confer that quality, the whole devolved on E, the survivor, during her life. *Hannan v Towers*, 147

5. A and B claimed the same land under different grants, bearing the same date, issued on certificates of survey also bearing the same date, made under common warrants; that B granted by renewal on the 29th of October 1754, and that to A granted on the 3d of February 1755, but A's certificate was first examined and passed. In an action of ejectment brought by the lessee of A—*Held*, that he was not entitled to recover, although the grant to A actually issued before the grant to B. *Karr's Lessee v Hughes*, 210
6. A grant dated the 8th of February 1802, to E and D, for the same land which had been conveyed by the commissioners appointed to preserve confiscated *British* property, to the lessors of the plaintiff, on the 12th of December 1785, which grant recited that E O purchased the said land of the said commissioners, a certificate whereof was lodged in the land office; that E O sold the said land to E S, who died intestate, and that the land had descended to E and D, his heirs at law—*Held*, that the legal title in the land did not pass or become vested in E and D in virtue of the grant to them. *Hutchings v Talbot, et al. Lessee*, 378, 380.
7. Parol evidence is admissible to prove that a tract of land called *L M E*, granted in 1751, was known and had acquired the name, by reputation, of *L M*, and that *L M E* was capable of acquiring the name of *L M*, by reputation, and the reference to it by way of call, was a good and legal reference—As where a tract of land called *D S*, in its 21st course called to run N 72 W 170 ps. to the end of 226 ps. on the 2d line of *L M*, which 2d line of *L M*, run only 140 ps. but the 2d line of *L M E* run 584 ps. And that the jury were bound in locating *D S* to run the 21st course of that tract, viz. N 72 W 170 ps. to the termination of 226 ps. on the 2d line of *L M E*. *Rench v Beltzhoover*, 469, 473.
8. It exclusively belongs to the court to determine on the true construction and operation of grants, and whether a call in a grant is to be gratified or not, and in what manner; and it exclusively appertains to the jury to find facts, and ascertain the true place or point called for in a grant, according to the evidence—As where the court refused to direct the jury, that it is a matter proper to be decided by them,

whether the call in the 21st line of a tract of land called *D S*, to the end of 226 ps. on the 2d line of a tract called *L M*, is a call possible to be gratified or not; and that the said call is a call to *L M*, although there are only 140 ps. not 226 ps. in the 2d line of *L M*; and that the jury might locate *D S* so as to run the 2d line of that tract with *L M*. *Ib.*

9. If a survey of a tract of land has a tree at the beginning of the tract, and all the lines are course and distance, and the tree cannot be proved, the survey may be preserved by the reference of a junior survey to the end of some of the lines, if the place of reference can be proved. *Ringgold v Galloway, et ux. Lessee*, 462

10. The Lord Proprietary could not be affected by any adverse possession of land before it had been granted. *Steuart et al. Lessee v Mason*, 531

See Ejectment 9, 10, 11, 12, 13, 16, 17, 22.

— Evidence 31, 39.

— Lease 1.

— Presumption 6, 7.

— Recital 1.

— Relation 1, 2.

— Terretenant 1, 3.

#### GUARDIAN & WARD.

See Court of Chancery 4, 5, 6, 16, 17.

— Evidence 24.

— Executors & Administrators 4.

— Infant 5, 6.

— Orphans Court 1, 2, 3, 4.

#### H.

##### HABEAS CORPUS.

1. The plaintiff in error having entered into a writ of error bond, with sureties, to the defendant in error, which was approved by the chancellor, a writ of error was sued out, and as the bond was not in double the amount of the debt and costs recovered, the defendant in error took out a *ca. sa.* on the judgment below, under which the plaintiff in error was taken in execution, who petitioned to, and moved the court of appeals, for a writ of *habeas corpus* to discharge him from the execution—*Held*, that a writ of *habeas corpus* could not issue. *Nirwood v Martin*, 199

##### HAND-WRITING.

See Evidence 29.

##### HEARSAY EVIDENCE.

See Affidavit 1.

See Commission & Commissioners 2.

— Evidence 30.

##### HEIR IN TAIL.

1. An heir or issue in tail, claiming *per formam doni*, is not compellable to fulfil a contract entered into by the tenant in tail for a sale of the entailed land. *Partridge v Dorsey's Lessee*, 320, 321

See Court of Chancery 14, 15.

##### HUSBAND & WIFE.

See Conveyance 1, 4.

— Feme Covert 2, 3, 4.

— Grant 4.

— Pleading 4.

##### I J.

##### IDIOT.

See Ejectment 31.

##### IMMEDIATE DEVISE.

See Devise 1.

##### IMPLIED ASSUMPSIT.

See Assumpsit 3.

##### IMPORTUNITY.

See Bankrupt & Bankruptcy 4.

##### IMPROPER QUESTION.

See Evidence 41.

##### IMPROVEMENTS.

See Court of Chancery 22.

##### INADMISSIBLE EVIDENCE.

See Evidence 25, 29, 41.

##### INCOMPETENT WITNESS.

See Free Negroes & Mulattoes 1.

##### INDICTMENT.

1. As the judgment on a conviction for committing the crime of *Sodomy* may be either at common law, or under the act of 1793, *ch. 57*, the conclusion in the indictment, *contra formam statuti*, is not improper. *Davis v The State*, 154

2. The crime of *Sodomy* is too well known to be misunderstood, and too disgusting to be defined, further than merely naming it, it is unnecessary therefore to lay the *criminaliter cognovit* in the indictment. *Ib.*

See Criminal Prosecution 2.

##### INDORSEE & INDORSOR.

See Endorsee & Endorsor.

**INDORSEMENT.**

See Endorsement.

**INDUCEMENT.**

See Contract 4.

— Declaration 4.

**INFANT.**

1. Where a conveyance of land had been decreed on a bill filed in chancery against an infant, on his arrival to age he petitioned for a reconveyance, &c. See *Court of Chancery*, 4, 5, 6, and *Fritzman et al. v Pitesell*, 77

2. — The former decree and proceedings cannot be pleaded in bar of the relief prayed. *Ib.*

3. An infant is not bound by the answer of his guardian, if he shows his dissent to it within the proper time. *Ib.*

4. A negro slave belonging to an infant, and brought into this state since the act of 1796, *ch. 67*, by the father and natural guardian of such infant, is not entitled to freedom. *Sprigg v Negro Mary*, 491

5. A minor can do no act to affect his rights, nor can his rights be affected by any act of his guardian. *Haney v Waddle*, 557

6. The guardian of a minor, importing into this state, contrary to law, a slave belonging to the minor, will not entitle such slave to freedom, nor will the assent of the minor, during his minority, vary the claim for freedom. *Ib.*

See Court of Chancery 16, 17.

**INJUNCTION.**

See Assumpsit 4.

**INQUIRY OF DAMAGES.**

1. Where the record stated that the jury, on an inquiry at bar under the act of 1794, *ch. 46*, were charged to inquire of the damages sustained by the plaintiff, omitting *and costs*, and the inquiry was not stated to be awarded on motion of the plaintiff—*Quere*, whether these were fatal errors? *Harris v Jaffray use of Gwynn*, 551

See Judgment 5.

**INQUISITION.**

See Judgment 5.

— Verdict 6.

**INROLMENT.**

See Enrolment.

**INSOLVENT DEBTOR.**

See Bankrupt & Bankruptcy 2.

**INSPECTOR OF TOBACCO.**

1. A former inspector of tobacco by mistake delivered to the holders of certain notes, other hhds. of tobacco than those mentioned in such notes. The hhds. corresponding with the notes, were by that inspector delivered over to his successor, and on his (the successor's) advertising them for sale under the act of 1802, *ch. 27, s. 4*, they were demanded by the former inspector, who brought an action of replevin for them. *Held*, that he was not entitled to recover. *Stevenson v Ridgely*, 281

**INSTRUCTIONS.**

See Evidence 45.

**INSURANCE.**

1. Covenant on an open policy of insurance on a cargo, where the vessel and cargo were condemned on account of contraband trade. Neither the insurers nor insured knew of the contraband article, it having been put on board secretly by the captain, nor was there any representation to the insurers that either vessel or cargo was neutral, nor a warranty to that effect—*Held*, by *Nicholson*, Ch. J. in the county court, that as the interest of the insured was proved to exceed the amount insured, he was entitled to recover against the underwriters. *Baltimore Insurance Company v Taylor*, 198

2. The warranty in a policy of insurance that the property in the insureds, is falsified by his having concealed papers on board of the vessel at the time of her capture—having practised artifice to prevent their detection, and by the use of fictitious names, &c. *Carriere v Union Insurance Company of Maryland*, 324

3. If there has not been a total loss, can the insured recover for a partial loss, without having abandoned? *Quere. Ib.*

See Freight 3.

— Policy of Insurance 1.

— Protest 1, 2.

**INTENTION.**

See Covenant 4.

— Usury.

— Will.

**INTERLOCUTORY DECREE.**

1. An appeal lies from an interlocutory decree of the court of chancery. *Gover et al. v Hall Ex'r. of Garrett, &c.* 43

**INTERROGATORIES.**

See Court of Chancery 10.

## INTRODUCTORY CLAUSE.

See Devise 7.

## INTRUSION.

1. Where there was no grant of the land produced, and no evidence that C, who conveyed the land to F, under whom the defendant in ejectment claimed, was ever in possession of the land; and if he was he was an intruder, and his deed could not operate to transfer any right to the land; and the entry and possession of F was an intrusion, the land being vacant. *Cockay's Lessee v Smith*, 20

See Adversary Possession

## INVENTORY.

See Executors &amp; Administrators 3.

## JOINT &amp; SEVERAL.

See Promissory Note 10.

## JOINT DEFENDANTS.

See Assumpsit 3.

## JOINT TENANTS.

See Grant 4.

## ISSUES.

1. Where the defendant pleaded three pleas in an action of replevin, to which the plaintiff replied, and tendered an issue to each, but issue was joined to the replication to the last plea only, and upon that issue a verdict was given for the plaintiff. On motion in arrest of judgment—*Held*, that the not joining issue on the first and second replications was healed after verdict. *Tyson v Rickard*, 109

See Assumpsit 8.

— Pleading 4, 5.

## JUDGES &amp; JUSTICES.

1. The acknowledgment of a deed conveying lands lying in Somerset county, made to the grantor in Prince-George's county, before J M G, stating himself to be chief judge of the first judicial district of this state—*Held*, to be a sufficient acknowledgment of the deed, without other evidence. *Teackle v Nicols's Lessee*. 574

## JUDGMENT.

1. The plaintiff cannot, under the act of 1809, ch. 153, take a judgment on a count in his declaration upon which he had given no evidence. *Wilson v Mitchell*, 91
2. Where an offence is punishable either at common law or under an act of as-

sembly, and the common law judgment is entered, but is stated to be according to the act of assembly—*Held*, that the unmeaning expressions that follow the judgment of the court, are to be rejected as surplusage. *Devins v The State*, 154

3. If a verdict is given for a larger sum of money than the damages laid in the declaration, the plaintiff may before judgment release the excess, and take a judgment for the amount of the damages laid in the declaration; or if after judgment, but during the same term, he tenders a remittitur of a parcel of the verdict, the court may strike out the judgment, and enter a judgment for the amount of the damages charged in the declaration. *Harris v Jeffray use of Gwynn*, 546
4. If a judgment is entered upon a verdict for more damages than laid in the declaration, no release, or other act of the plaintiff, can give validity to that judgment, but on appeal or writ of error, it must be reversed; and the law in that respect is not altered by the act of 1809, ch. 153. *Ib* 547
5. — But under the acts of 1809, ch. 153, and 1811, ch. 161, where, by an inquisition on an inquiry at bar, the jury assessed a larger amount of damages than was laid in the declaration, and judgment was rendered for the sum found by the inquisition; on an appeal by the defendant, the court of appeals permitted the plaintiff to release the excess, and enter the release on the record, and they amended the record by entering a judgment for the damages laid in the declaration. *Ib* 550
6. In an action on a bond with a collateral condition, and judgment rendered therein for the plaintiff on a case stated—On appeal, the judgment was reversed, because there was no replication setting forth the breaches. *Kerr, et al. v The State use of Levy Court, &c.* 560

See Court of Chancery 21, 23.

— Error 1.

— Evidence 31.

— Pleading 4, 5.

— Sodomy 2.

— Terretenant 1, 2, 3.

## JURISDICTION.

See County Court 1.

— Court of Oyer &amp; Terminer, &amp;c. 1.

— Criminal Prosecution 3.

— General Assembly 1.

— Orphans Court 1, 2, 3, 5.

— Waste 1.

## JURY & JURORS.

- See Certificate of Survey 1.
- Composition Money 1.
- Direction 1.
- Ejectment 26, 27.
- Grant 8.
- Variation.
- Verdict.

## JUSTIFICATION.

- See Slander
- Waste 1.

## L.

### LAND COMMISSION.

- See Commission & Commissioners.

### LAND OFFICE.

1. Evidence admitted to prove that none of the records of the land office have been lost, &c: *Cockey's Lessee v Smith*, 20
  2. The time when a certificate of survey was returned to the land office, and the time when the caution money was paid, are facts for the decision of the jury. *Stewart, et al. Lessee v Mason*, 528, 531, 534.
  3. Evidence that the certificate of an elder survey was in the land office when a junior survey was made and an elder grant thereon obtained, is for the decision of the jury. *ib.*
- See Grant.
  - Presumption.

### LAPSE OF TIME.

- See Ejectment 37.
- Estate for Life 2.

### LEASE.

1. The Lord Proprietary, by his agent, in 1744, leased to W F, for 99 years, a parcel of land called L A, being part of one of his Lordship's reserved manors. W F, with the consent of the agent, assigned the lease to J L, who by deed in 1766 conveyed his interest to W M, and who in 1794 executed a bond of conveyance to N M, conditioned for the conveyance of one half of a tract of land called G. In May 1789 W M had surveyed for him a parcel of reserve land, and called it G, which in January 1797 he assigned to N M, and in February 1797, N M assigned to T O, who as assignee, in April 1797, had resurveyed L A, so leased to W F, and called it B G, being the same land before surveyed for W M and called G, for which the purchase money was paid to the treasurer in November

1797, and a patent thereupon issued to T O in January 1800: T O, in August 1800, conveyed the same land to N M—*Held*, that the leasehold interest subsisted and remained unextinguished, and was not merged in the freehold by the patent to T O. *Bradford's Lessee v M'Comas et al.* 445

See Ejectment 26, 27.

- Evidence 32.
- Usury.

### LEASE & RELEASE.

- See Ejectment 30.

### LEASE, ENTRY & OUSTER.

- See Tenant in Possession 1.
- Ejectment 7.

### LEASEHOLD.

- See Lease 1.

### LEGACY.

1. A S by his will bequeathed to A W a legacy to be paid to her at her day of marriage; but if she died without lawful issue of her body, then the said legacy should fall over and be paid to E W. A W afterwards married G J, since deceased, and A W is also since deceased, intestate, and without issue, —*Held*, that the legacy vested in A W and the limitation over was void. *The State use of Thomas v Munn.* 236
- See Court of Chancery 12.
  - Executors & Administrators 2, 3.

### LEGISLATURE.

- See General Assembly.

### LESSOR OF THE PLAINTIFF.

- See Ejectment 36.
- Verdict 7.

### LEVY COURT.

- See Special Authority 1.

### LIABILITY.

- See Bill of Exchange 6.
- Surety.

### LIBEL.

- See Variance 1.

### LICENSE.

- See Trespass 3.

### LIEN.

- See Court of Chancery 21.
- Evidence 34.
- Factor 1.
- Freight 1.
- Terretenant 2.

**LIFE ESTATE.**

*See* Estate for Life.

**LIMITATION OF ACTIONS.**

1. A plea of the act of limitations is a bar to an action on a bond given to the state by a trustee appointed under a decree of the court of chancery for the sale of the real estate of a deceased person, where the bond was executed more than twelve years before the institution of the suit. As where A Q was appointed a trustee, under a decree of the court of chancery, to sell the real estate of J S, deceased, and gave bond as such to the state, with J M and C S, his sureties, on the 20th of December 1795, and the action was brought on the bond against C S, one of the sureties, on the 4th of May 1809, who pleaded the act of limitations, to which there was a general demurrer—The county court ruled the demurrer good; but on appeal reversed. *Schell v The State use of Sower*, 538  
*See* Adversary Possession 1.  
 — Court of Chancery 22.  
 — Evidence 23.

**LIMITATION OF ESTATE.**

*See* Legacy 1.

**LOAN.**

*See* Usury.

**LOCATION OF LANDS.**

1. Where there is a location on the plots in an action of ejectment by either of the parties of a tract of land, deed, plot, &c. and there is no counter location by the adverse party, such location is admitted. *Hughes's Lessee v Howard*, 9
2. No evidence can be given of the location of a deed, plot, &c. which does not correspond with it. *Ib.*
3. Where the defendant produced and read certain proceedings which were variant from the location made on the plots by him, without objection being made to the legality of the evidence, it cannot render the same legally admissible when offered by the plaintiff. *Ib.*

*See* Ejectment 28.

— Grant 3, 7, 8, 9.

— Parol Evidence 1, 4.

— Verdict 1.

**LOTTERY.**

1. The managers of a lottery have a right to correct any mistakes which may be discovered at any stage of the

drawing; and if on the conclusion of the first drawing of the lottery there were a number of blanks and prizes in one wheel, and no numbers in the other, it was an error which the managers had a right to correct; and the person who had drawn a prize on the first drawing, is not entitled to recover, unless the incorrect state of the wheel was owing to fraud, negligence, or other improper conduct on the part of the managers. *The State use of Eckman v Wolfe, et al.* 224

**LORD PROPRIETARY.**

*See* Proprietary.

**LOSS OF RECORDS.**

*See* Land Office 1.

— Presumption 3.

**LUNATIC.**

*See* Ejectment 31.

**M.****MERGER.**

*See* Lease 1.

**MESNE PROFITS.**

1. The plaintiff may support an action for *mesne profits* of land recovered in ejectment, notwithstanding the judgment in ejectment has been removed to and is depending in the court of appeals, and there has been no entry or possession by the plaintiff, &c. *See* Trespass 1, and *Shipley v Alexander*, 84
2. — He can recover profits from the time of the demise, without showing title, the defendant being concluded by it. But if he claims profits prior to the time of the demise, the defendant may controvert his title. *Wood v Grunby, et al. Lessee.* 13

**MINOR.**

*See* Infant.

**MISNOMER.**

*See* Ejectment 22.

**MISTAKE**

*See* Inspector of Tobacco 1.

— Lottery 1.

**MITIGATION OF DAMAGES.**

*See* Evidence 21, 41.

**MONEY HAD & RECEIVED.**

*See* Assumpsit 5.

— Corporation 2.

**MORTGAGE.**

1. Where certain deeds were considered as mortgages made to secure the payment of money due, &c. See *Court of Chancery* 8, and *Turner v Bouchell's Ex'r, et al.* 99
- See *Court of Chancery* 10, 21.

**N.**

**NAME.**

- See *Ejectment* 22.  
 — Grant 7.  
 — Parol Evidence 4.

**NATURAL GUARDIAN.**

- See *Gift* 1  
 — Infant 1.

**NEGROES & SLAVES.**

- See *Evidence* 25.  
 — Freedom.  
 — Free Negroes & Mulattoes.  
 — Gift.  
 — Infant.  
 — Parol Gift.

**NEW PARTIES.**

- See *Ejectment* 33, 35.

**NEW TRIAL.**

- See *Verdict* 2, 3.

**NO ASSETS.**

- See *Executors & Administrators* 3.

**NON CLAIM.**

- See *Ejectment* 30.

**NON RESIDENT.**

- See *Conveyance* 4, 7.

**NOTARY PUBLIC.**

1. A notary public, except in those cases where a protest by *lex mercatoria*, or by statute, has no authority to take a protest. *Patterson v The Maryland Insurance Company*, 4
  2. The point of view in which the authority of a notary public is to be considered generally, relates to those commercial transactions occurring in one country which are to be proved in another, or in which foreigners are interested, and the office derives its existence from the courtesy of one nation to another. And where he is to do certain acts by statute, the authority is limited to its designated object. *Id.*
- See *Protest* 2.

**NOTICE.**

- See *Bill of Exchange* 5.  
 — *Commission & Commissioners* 2.  
 — *Relation* 2.

**NUNCUPATIVE WILL.**

1. A nuncupative will established where the personal property, of which the deceased died possessed, amounted by an inventory thereof to \$3236 48. *Brayfield v Brayfield*, 208
2. A nuncupative will was proved by three witnesses, one of whom was the wife of one of the legatees, but which legatee had released all his interest, &c. to certain of the representatives of the deceased; and although the release was not accepted by the releasees, it was held to be a good release, and that the will was legally proved. *Id.*

**O.**

**OATH.**

- See *Commission & Commissioners* 1.

**OBLIGOR.**

- See *Bond* 2.

**OFFICE COPY.**

1. The plots returned in an action of ejectment are a part of the record, and one of the original plots, or a copy, ought to be annexed to a transcript of the proceedings to make it evidence. *Orndorff v Mumma*, 70
- See *Evidence* 7, 17, 26, 32, 40.  
 — Grant 1.

**OFFICER.**

- See *Evidence* 36.  
 — *Inspector of Tobacco* 1.

**OPEN ACCOUNT.**

- See *Assumpsit* 8.

**ORIGINAL.**

- See *Bill of Sale* 1.  
 — *Evidence* 7.  
 — *Power of Attorney* 1.

**ORPHANS COURT.**

1. The accounts of a guardian rendered to, passed and allowed by the orphans court, are not conclusive evidence either on the guardian or his ward, but they are *prima facie* evidence only, of the balances respectively due by the guardian to his ward, and are open to examination by a court and jury. See

EVIDENCE 24, and *Spedden v The State use of Marshall, et ux.* 251

2. The orphans court have no authority to allow to a guardian for the maintenance and education of his ward, for any period of time previous to his appointment. *Ib.*
3. The sums of money allowed by the orphans court to a guardian, for the board, clothing and education, of his ward, is not a final and conclusive ascertainment of the sums to be allowed to the guardian for the maintenance and education of the ward; but it is competent to the ward to show by other evidence, that the sums were improperly allowed by the orphans court, or that they were larger allowances than ought to be made to the guardian for the maintenance and education of his ward. *Ib.*
4. Where the sum of money allowed by the orphans court to a guardian, for the maintenance and education of his ward, exceeded the annual income of the ward's estate, it was held, in an action against the guardian by his ward, that the guardian was concluded thereby, and that the jury could not exceed the sum so allowed to him. *Ib.*
5. A court of law is not concluded by an account settled and passed by an administrator with the orphans court, from investigating and judging of the propriety of the disbursements therein stated. *The State use of Suppington, et ux. v Massey,* 276, (note)

OYER & TERMINER, &c.

See Court of Oyer & Terminer, &c.

OVERSEER.

See Slander 1.

P.

PARENT & CHILD.

See Gift 1.

— Infant 4.

PAROL AGREEMENT.

See Warranty 1.

PAROL EVIDENCE.

1. To prove the original location and survey of a tract of land, calling to begin at the end of one of the lines of another tract, and to run to and intersect other tracts, &c. and that it began at and run to particular places described on the plots, parol evidence of the surveyor, who originally locat-

ed and surveyed the tract of land, was admitted as legal and competent. *Tenant v Humbleton,* 253

2. Parol evidence is inadmissible to prove that it was the intention of a grantor, in a deed of bargain and sale, to convey a lot of ground by the courses and distances used therein, and not the whole lot. *Buchanan's Lessee v Stewart,* 329
3. An exchange of lands cannot be proved by parol evidence. *Maydwell, et al. Lessee v Carroll,* 361
4. Parol evidence is admissible to prove that a tract of land called *L M E*, granted in 1751, was known and had acquired the name, by reputation, of *L M*, and that *L M E* was capable of acquiring the name of *L M* by reputation, and the reference to it by way of call was a good and legal reference—as where a tract of land called *D S* in its 21st course called to run N 72 W 170 ps. to the end of 226 ps. on the 2d line of *L M*, which 2d line of *L M* run only 140 ps. but the 2d line of *L M E* run 584 ps. And that the jury were bound in locating *D S*, to run the 21st course of that tract to the termination of 226 ps. on the 2d line of *L M E*. *Rench v Beltzhoover,* 473
5. Where the certificate of survey of a tract of land called *C F*, made in 1736, stated that tract to begin at the end of the 14th line of *C Manor*, and it was proved that the original certificate of survey of *C Manor* was not recorded in the records of the land office, nor to be found, &c. parol evidence was admitted to prove that a survey of *C Manor* was originally made prior to, or contemporaneously with, the survey of *C F*. And it was held, that where the 14th line of the survey of *C Manor* terminates, according to its true location, is the identical place where *C F* begins; and whatever is competent and legal evidence to prove the beginning of *C F*, is legal and competent evidence to prove the termination of the 14th line of *C Manor*, and so *vice versa*. *Ringgold v Galloway, et ux. Lessee,* 461
6. In the absence of proof as to the beginning tree and courses of a tract of land called *C Manor*,—(the beginning tree being destroyed or incapable of proof, and the courses lost,) the legal foundation being laid, the next best or secondary evidence may be resorted to and is legally admissible; that is, proof

by parol evidence of the beginning of a tract of land called *C F*, calling to begin at the 14th line of *C Manor*, and by reversing the lines from that point to the place of beginning of *C Manor*.

*Ib.* 462

See Assumpsit 5.

— Bill of Exchange 4.

— Commission & Commissioners 2.

— Evidence 31.

— Power of Attorney 1.

— Terretenant 1.

### PAROL GIFT.

See Evidence 25.

— Gift 1.

### PARTIES.

1. Where it seemed to be unnecessary that the legatees should be made parties to a bill filed against the heirs and executors of the testator. *Dorsey v Dorsey's Heirs, &c.* 410

2. It seems not to be necessary, on a bill filed to set aside a sale made by a trustee, to make the representatives of the person, who purchased at such sale for the benefit of the trustee, parties to the suit. *Ib.*

See Court of Chancery 13.

— Ejectment 35.

— New Parties.

### PARTIES & PRIVIES.

See Deposition 2.

### PARTNERS & PARTNERSHIP.

1. In an action of *assumpsit* for money had and received, and for money lent, a witness proved, that the plaintiff advanced to the defendant \$150, to be employed as a capital in trade, \$50 to be considered as the plaintiff's share, another \$50 as the defendant's share, and the remaining \$50 as the witness's share, in the capital sum of \$150. The said three persons were to share in the profits arising in the course of their joint trade, which was to continue for an indefinite period; and on the dissolution of the partnership, the plaintiff was to be entitled to receive his \$150, \$50 from the defendant, and \$50 from the witness, exclusively of his one third of the profits which might be made by the partnership. The facts were, that the plaintiff applied to the defendant for an account of the profits, which the defendant refused to furnish, alleging that the plaintiff was not entitled to any part of the profits, but paid the plaintiff a sum of money in part, but less than

that originally advanced by him. The county court directed the jury, that these facts amounted to a dissolution of the partnership; but, on appeal, *Held*, that it ought to have been left to the jury to decide, whether from the facts and circumstances proved the partnership in question was dissolved. — *Held* also, that the witness testified to an undertaking distinct from the partnership, which might be enforced in a court of law by an action of general *indebitatus assumpsit*, and that the witness was competent to prove such an undertaking. *Roache v Pendergast*, 33

2. A and B, with other persons since dead, had been engaged, as copartners in certain proportions, in many mercantile adventures and speculations, which continued for several years, of which no liquidation or settlement between them had taken place; and among which they were joint owners, in said proportions, of a brig and cargo, which were captured, and by decree of the vice admiralty court, were restored free from salvage, but an appeal being interposed by the captors, it was necessary, in order to retain the property for the owners, to give security to abide the final decree on the appeal, and O and P became sureties for them. The vessel and cargo returned, and came to the possession of B, and the other partners, who disposed of the same. After which the sentence of the vice admiralty court was reversed, and it was decreed that salvage should be paid, and it was paid by O and P, who brought suit against A and B, and the other partners, and obtained judgment, which was paid by A, he being the only solvent partner, the others having been declared bankrupts. A brought an action of *assumpsit* against B, who had survived the other partners, to recover of him the proportion which he ought in justice and equity to contribute—*Held*, that A was not entitled to recover in such action. *Kennedy v M'Fadon & Caton*, 194

3. One partner cannot sue his copartners at law, where there has been no liquidated balance ascertained to be due. *Ib.*

4. If a person derives a benefit from a trade in which another is engaged, by receiving a portion of the profits, he is liable, although he acts only in the character of an agent; and receives such profits as a compensation for his

agency. *Taylor v Terme & Jauffret*, 505

See Court of Chancery 1.

#### PAYEE.

See Bill of Exchange 6.

— Promissory Note 7, 8.

#### PAYMENT.

See Evidence 22.

#### PAYMENT OF TAXES, &c.

See Presumption 7.

#### PETITION FOR FREEDOM.

1. A petition for freedom is comprehended within the general terms of suits or actions in the second section of the act of 1804, *ch. 55*, relative to their removal from one county court to another—See REMOVAL OF CAUSES 1, and *Queen v Neale*, 158  
See Freedom.

#### PLAINTIFF.

See Action 1, 2.

— Cestui Que Use 1.

#### PLEADING.

1. Where it appears by the record that before the defendant's imparlance, and afterwards in the first plea by him pleaded, he "came and defended the wrong and injury, &c." Such defence need not be repeated in the other pleas by him pleaded. *Dent's Adm'r. v Scott*, 28
2. Where a plea of justification was put in short, in an action of slander, with an agreement of the counsel that it should be considered as if a good and valid plea of justification had been put in at length in a formal and legal manner. The court of appeals, on the record coming before them by a writ of error brought by the plaintiff—*Held*, that the plea was not sufficiently pleaded, and upon that ground reversed the judgment. *Orme v Lodge*, 83
3. Where the defendant pleaded three pleas in an action of replevin, to which the plaintiff replied, and tendered an issue to each, but issue was joined to the replication to the last plea only, and upon that issue a verdict was given for the plaintiff. On motion in arrest of judgment—*Held*, that the not joining issue on the first and second replications was headed after verdict. *Tyson v Richard*, 109
4. In an action of replevin by husband and wife, the defendant pleaded five

pleas—one, property in himself—two, of the act of limitations, and two others, a former action for the same cause of action, &c. To the first plea issue was joined; to the second and third pleas there were replications that the wife was a minor until after her marriage, &c. but there were no issues joined upon them; and to the fourth and fifth pleas there were general demurrers, upon which judgments were rendered for the defendant. No disposition was made of the issue in fact on the first plea—*Held*, that where the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is overruled, judgment of *nil capiat* shall be entered, although there may be also one or more issues in fact. *O'Brien, et ux. v Hardy*, 434

5. — If the demurrers are decided before the issues are tried, they shall not be tried; and if after the trial, it will make no difference, for in each case judgment of *nil capiat* shall be given against the plaintiff. *Id.*
6. If the pleadings in a record transmitted to the court of appeals by writ of error, are entered short, the judgment must be reversed. *Scholls et al. v Strinner*, 490
7. Where the replication to a plea of general performance, in an action on a bond given by a trustee appointed under a decree of the court of chancery for the sale of the real estate of J S, sets out the decree, but does not make a profert of it, and stated that by the decree, which was in the usual form, the trustee was directed to bring into the court the money arising from any sale by him made, to be applied, under the chancellor's directions, to the purposes mentioned in the will of J S; that the trustee accepted the trust, gave bond, made the sale, took bonds and received the money. The will of J S is set out, showing the share and interest of L S, (for whose use the action was brought,) in the money arising from the sale. The breaches assigned were, that the trustee neglected to return an account of his proceedings, or the bonds, or the proportion of the money to which L S was entitled, to be applied, under the chancellor's direction, to the payment of the share of L S as directed in the will. A general demurrer to this replication was overruled by the county court, but on appeal reversed, *Scholl v The State use of Sower*, 558

8. In an action of trover, the defendant, at a subsequent term after issue had been joined on his plea of not guilty, filed another plea, viz: "And the said D, by Z H his attorney, comes and defends the force and injury when, &c. and says, that the said P his action aforesaid further against him to have and maintain ought not, because he says," &c. then setting forth that P had at the *preceding* term of the said court, obtained a judgment in an action of trover against W T, for conversion of the same goods, &c. and concluding the plea—"And this the said D is ready to verify, wherefore he prays judgment if the said P his action aforesaid against him to have and maintain ought, &c." To this plea there was a general demurrer—*Quere*. Whether it was a second plea in bar, or a plea *puis d'ancien continuance*? *Harris v Jeffrey* use of *Gwyn*. 551
9. In an action on a bond with a collateral condition, a judgment was rendered therein for the plaintiff on a case stated—on appeal the judgment was reversed, because there was no replication assigning the breaches. *Kerr et al. v The State use of The Levy Court*, &c. 560
10. In an action of *assumpsit* against one of two joint promissors, he cannot, to defeat the action, rely on the note being joint. If he intended to avail himself of that circumstance he ought to have pleaded it in abatement. *Brown v Warram*, 572

See Arbitration & Arbitrators.

- Assumpsit 8.
- Court of Chancery 4.
- Debt 1.
- Declaration
- Executors & Administrators 2, 3, 4.
- Infant 2.
- Terretenant 2, 3.
- Trespass 3.

PLOTS.

- See Ejectment 28, 36.  
— Verdict 7.

POLICY OF INSURANCE.

1. In covenant on a policy of insurance stating, that H and W for account of T, (the plaintiff,) did make insurance, and cause themselves, and their and every of them, to be insured, &c. and the assurers (being a corporate body,) executed the policy under their common seal. The declaration stated, that the plaintiff, according to the usage and custom of merchants, (through

and by H and W his attorneys and agents,) in his own name did make insurance, &c.—*Held*, that the action was well brought. *Maryland Insurance Company v Graham*, 62  
See Insurance 2.

POSSESSION.

- See Bill of Sale 4.  
— Conveyance 6.  
— Ejectment 9, 10, 28, 24, 37.  
— Evidence 31, 47.  
— Intrusion 1.  
— Mesne Profits 1.  
— Presumption 1, 2, 3, 6, 7.  
— Terretenant 1, 3.  
— Trespass 1.  
— Vacant Land.

POWER.

- See Authority.  
— General Assembly.  
— Trust & Trustee.

POWER OF ATTORNEY.

1. A witness having proved that he received a power of attorney from a person to act for her in all things relating to her estate as well in collecting debts, as in making sale of property, &c.—*Held*, that unless the original power of attorney was produced, or proved to be lost, or that a *subpena* to the witness with a *duces tecum* had issued, no evidence could be given of the power of attorney. *Rush v. Sou-erwine*, 98  
See Court of Chancery 16.

PRACTICE.

- See Infant 1, 2, 3.  
— Pleading 9.

PREFERENCE.

- See Bankrupt & Bankruptcy 2.  
— Bill of Sale 3.  
— Court of Chancery 21.

PRESUMPTION.

1. Secondary evidence resorted to for presuming a grant of land, rest on strong facts and circumstances evincing an equitable right to the land—an incipient title from the Proprietary, and length of possession in conformity thereto—mesne conveyances, and wills transmitting the right from the taker-up to the plaintiff in ejectment. *Cockey's Lessee v Smith*, 20
2. The producing the grant is the first step in deducing title; if that is wanting, and inferior testimony is resorted to for presuming a grant, the founda-

tion must be laid by stating and combining all the facts and circumstances in the case, on which the court are to direct the jury to presume and find a grant. *Ib.*

3. To repel the plaintiff's title, the defendant must produce an antecedent grant, or give evidence that such grant had existed, or show an incipient title, or proof that the records of the land office were lost or destroyed, and show a rightful possession accompanying his title. *Ib.*
4. Length of possession is the great and leading fact in presuming grants and deeds, and without which no grant or deed can be presumed. *Ib.*
5. It belongs to the court to determine on the legal sufficiency of facts and circumstances which will warrant the jury in presuming and finding a grant. *Ib.*

6. To lay a foundation for presuming a grant for land, it is necessary to show an incipient title from the Proprietary, that is, an equitable interest direct from the Proprietary by a locatable warrant and payment of the composition; or a certificate of survey under a common, or other warrant, and payment of the composition, and length of possession consequent on such equitable interest, in the person acquiring the same, and those claiming under him. *Mundell's Lessee v Clerklee*, 468

7. Where the defendant in ejectment offered in evidence certain common warrants granted to N B in 1694, for the surveying sundry quantities of land, and to prove that the tract of land called *B R*, for which he took defence, was surveyed under those warrants, and that a grant had issued therefor to N B, and that the jury ought to presume such grant had issued, he offered in evidence a deed from N B to J R in 1706, for a parcel of land called *B R*; also certain entries on the rent rolls, showing that *B R* had been surveyed for N B in 1695, and an alienation thereof in 1706 by N B to J R, and that it was afterwards possessed by R L; also a deed from J R to R L in 1737, for *B R*, and that R L had paid the quitrents from 1753 to 1772, and the county assessments from 1781 to 1804, and that R L, and his heirs, had been in possession during that time—*Held*, that the above facts were not sufficient for the jury to presume a grant had issued to N B for the land called *B R*. *Ib.* 462, 468

See Conveyance 8.

- Ejectment 10, 11, 12, 13, 14, 23, 24, 29, 37.
- Estate for Life 2.
- Evidence 19, 31, 39.
- Judges & Justices 1.
- Terretenant 3.

#### PRIMA FACIE EVIDENCE.

See Deposition 3.

- Evidence 24, 27, 36.
- Judges & Justices 1.
- Protest.

#### PRIORITY.

See Grant 4.

- Preference.

#### PRINCIPAL & AGENT.

See Factor 1.

#### PRISON BOUNDS.

See Escape 1.

- Sheriff 2.

#### PRO CONFESSO.

See Court of Chancery 12.

#### PROFERT.

See Pleading 7.

#### PROFITS.

See Court of Chancery 8, 22.

- Partners & Partnership 4.
- Rents & Profits.

#### PROMISE.

See Covenant 2.

#### PROMISSORY NOTE.

1. A subsequent endorser of a promissory note, discounted for the accommodation of the drawer, can, in an action of *assumpsit*, recover against a prior endorser the whole amount recovered against him by the holder of the note, See *BILL OF EXCHANGE*, 2, 3, 4, and *Wood v Repoll*, 125
2. To enable the assignee of a promissory note to maintain an action on it in his own name against the maker of the note, it is essential that the words "or order," or "bearer," or words equivalent, should be inserted in the statute, and no notes are within the statute, for the purpose of assignment but such as are made payable to A B, or order, or bearer. The words or order, or bearer, are of no importance in a suit brought by the payee. *Noland v Ringgold*, 216
3. — The act for the amendment of

the law (1809, *ch.* 153,) does not take in the above case, altho' there may be other counts in the declaration, besides that upon the above note, which are good. *Ib.*

4. If the date of a promissory note is altered after it passed from the maker, and without his privity and consent, the note is a nullity as to him. *Mitchell, et al. v Ringgold,* 159

5. Certain letters from the maker of a promissory note to the payee, were held not to contain sufficient evidence of authority to the payee to change the date of the note. *Ibid.*

6. Where a promissory note was delivered by the maker to the payee as his agent, to be discounted, and it was blank as to date and sum at the time of the delivery, and the payee filled up the date and sum, but before he discounted it, and while it continued in his possession, changed the date, and then endorsed it to the plaintiff for a *bona fide* consideration—*Held,* that such change destroyed the validity of the note as against the maker. *Ibid.*

7. In *assumpsit* on a promissory note by the endorsee against the drawer, the payee is a competent witness to prove the note had been paid to the plaintiff. *Ringgold v Tyson,* 172

8. — He is also a competent witness to prove that the note was given on a usurious consideration. *Ib.*

9. The endorsee or holder of a promissory note cannot recover in his own name on an endorsement in blank. *Ib.* 179

10. In *assumpsit* on a joint promissory note, against one of the makers, he cannot, to defeat the action, rely on the note being joint. If he intended to avail himself of that circumstance he ought to have pleaded it in abatement. *Brown v Warram,* 572  
See Release 1.

#### PROPRIETARY.

See Adversary Possession 1.

— Intrusion.

— Vacant Land.

#### PROPRIETARY INSTRUCTIONS.

See Evidence 45.

#### PROPRIETARY LEASES.

See Evidence 32.

— Lease 1.

#### PROTEST.

1. In an action on a policy of insurance,

in order to prove the several matters alleged in the declaration, the plaintiff offered to read in evidence a protest made by the captain and others, of the vessel on her return, before a notary public in *Baltimore*—*Held,* that the protest was merely a voluntary affidavit, and a notary public, except in those cases where a protest by *lex mercatoria*, or by statute, has no authority to take a protest. *Patterson v The Maryland Insurance Company,* 74

2. The protest of the captain is not the best evidence the nature of the transaction admits of: It is not to be considered as a deposition *de bene esse*; and it cannot be used as *prima facie* evidence only, which is equally as objectionable as if used as positive proof; for it would throw the *onus probandi* on the opposite party. *Ib.* 75  
See Bill of Exchange 4, 5.

#### PROVISO.

See Devise 6.

#### PUBLIC BONDS.

See Auctioneer.

— Limitations of Actions 1.

#### PUBLIC OFFICER.

See Evidence 36.

— Inspector of Tobacco 1.

#### PUBLIC ROADS.

See County Court 1.

#### PUIS DARRIEN CONTINUANCE.

See Pleading 8.

#### PUNCTUATION.

See Acts of Assembly 2.

#### Q.

#### QUESTION.

See Evidence 41.

— Facts.

#### QUIT RENTS.

See Presumption 7.

#### R.

#### RECITAL.

1. The recital in a grant of the date of the certificate of survey, upon which the grant was founded, is not sufficient evidence of the time when the survey was made, to support an action of ejectment for the same land,

brought before the date of the grant, but subsequent to the recited date of the survey. *Henderson's Lessee v Parker*, 117

### RECORD.

1. The plots returned in an action of ejectment are a part of the record, and one of the original plots, or a copy, ought to be annexed to a transcript of the proceedings to make it evidence; and where a copy of the proceedings in such an action, wherein the verdict and judgment were for land as located on the plots returned in the cause, having no plot or a copy annexed thereto, it was held to be a part only of the record, and was not sufficient evidence, though otherwise properly authenticated. *Orndorff v Munna*, 70

See Evidence.

— Inquiry of Damages 1.

— Land Office.

— Presumption.

### RECORD EVIDENCE.

See Bill of Exchange 4.

— Evidence 12, 16, 34.

### REDEMPTION.

See Court of Chancery 8.

### REFERENCE.

See Award.

### RELATION.

1. If the caution money is paid on the return of a certificate of survey, and a grant is subsequently obtained, it will relate to the date of the certificate, though the warrant, under which the survey was made, was irregularly obtained, provided no other person becomes interested between the date of the warrant, and the return of the certificate. *Stewart, et al. Lessee v Mason*, 528, 533, 534
2. If an elder certificate of survey was not in the land office when a junior survey was made, and an elder grant thereon obtained, the person claiming under the junior certificate was a purchaser without notice, and having obtained the first grant, it cannot be defeated by permitting the junior grant to relate to the elder certificate, so as to overreach the title under the elder grant. *Ib.* 534

See Grant 5.

### RELEASE.

1. A promissory note given by a broker

to the agent of the managers of a lottery, for the amount of lottery tickets sold to him for them, and which note, when paid, was to be considered as full payment of the money received for the tickets, does not, if the note is not paid, release the bond entered into by the broker to the corporation granting him a license to act as such, against the claim of the managers of the lottery, nor does it release the sureties in such bond. *McCoy, et al. v The Mayor, &c. of Baltimore*, 193

See Evidence 25.

— Judgment 3, 4, 5.

— Nuncupative Will 2.

### RELINQUISHMENT.

See Estate for Life 2.

— Verdict 3.

### REMITTITUR.

See Judgment 3.

### REMOVAL OF CAUSES.

1. The court of oyer and terminer, &c. of Baltimore county, have an undoubted power to order the record of proceedings on an indictment, to be transmitted to an adjoining county court, the party charged having previously complied with the directions of the act of 1805, ch. 65, s. 49. *Davis v The State*, 154
2. A petition for freedom is comprehended within the general terms of suits or actions in the second section of the act of 1804, ch. 55, relative to their removal from one county to another; and the county court, in which the suit is instituted, are bound to transmit the proceedings to the judges of any county court within the district, upon the affidavit of either of the parties competent to make an affidavit, or upon such other proper and competent evidence as may be offered in support of the suggestion, that an impartial trial cannot be had, &c. *Queen v Neale*, 158

See Appeal.

### RENT.

See Usury 1, 6.

### RENT ROLLS.

See Presumption 7.

### RENTS & PROFITS.

See Court of Chancery 8, 22.

— Devise 8.

REPLICATION.

1. A judgment rendered for the plaintiff on a case stated, in an action on a bond with a collateral condition, was reversed, because there was no replication assigning the breaches. *Kerr, et al. v The State use of the Levy Court, &c.* 560
- See Pleading 7.

REPLEVIN.

- See Evidence 41.
- Freight 1.
  - Inspector of Tobacco 1.

REPUTATION.

- See General Reputation.

RESCINDING OF CONTRACT.

- See Contract 2.

RESIDUARY DEVISE.

- See Devise 7.

RESTRICTIVE CLAUSE.

- See Devise 9.

RETURN OF PROCESS.

- See Attachment 1.

REVERSAL.

1. A judgment in favour of the defendant reversed on a writ of error brought by the plaintiff, on the ground that the defendant's plea was put in short, altho' agreed by the counsel to be received, and to be considered as if pleaded at length in a formal manner. *Orme v Lodge,* 83
  2. The court of appeals having reversed a decree of the court of chancery, stated an account between the parties, and decreed accordingly. *Turner v Bouchell's Ex'r. et al.* 106
  3. In an action on a bond, with a collateral condition, and a judgment rendered therein for the plaintiff on a case stated—on appeal the judgment was reversed, because there was no replication assigning the breaches. *Kerr, et al. v The State use of the Levy Court, &c.* 560
- See Court of Appeals 2, 5.
- Error 1.
  - Pleading 6.

ROAD.

- See County Court.

ROGUE.

- See Slander 10.

S.

SALE.

- See Auctioneer 2.
- Court of Chancery 18.

SCIRE FACIAS.

- See Evidence 31.
- Terretenant 1, 2, 3.

SEA WORTHY.

- See Freight 2.

SECONDARY EVIDENCE.

- See Parol Evidence 6.

SEIZIN.

- See Evidence 39.
- Terretenant 1, 3.

SET OFF.

- See Executors & Administrators 5.

SETTLEMENT.

- See Court of Chancery 16, 17.

SHERIFF.

1. An action of trespass *vi et armis* will lie against a sheriff for seizing under a *fieri facias*, and selling, slaves which had been by a bill of sale duly executed, acknowledged and recorded, in the county of *Washington*, in the district of *Columbia*, transferred by the defendant in the *fieri facias* to a *bona fide* creditor, although the slaves remained in the possession of such defendant. See *BILL OF SALE 3*, and *Bruce's Adm'rs. v. Smith,* 499
  2. In an action on a sheriff's bond for a voluntary escape of a debtor committed to the custody of the sheriff under an execution—*Held*, that if the sheriff appointed the dwelling-house of the debtor as his prison, and the debtor was there confined, and his dwelling-house was not part of the public gaol and prison of the county, and was not within the prison walls and prison bounds of the gaol, there was proof of a voluntary escape. *Jones v The State use of Orr,* 559
- See Attachment 1.
- Bill of Sale 2.
  - Deposition 2, 3, 4.
  - Warrant of Resurvey 1.

SLANDER.

1. In an action of slander by an overseer against his employer, the words charged were, that the overseer had stolen wheat and corn of the employer—

*Held*, that an overseer, on wages, may be guilty of felony of the goods of his employer entrusted to him as overseer, and that a charge of stealing such goods is actionable. *Wheatly v Wallis*, 1

2. In an action of slander, the words charged to have been spoken were, "you are a rogue, and I can prove that you cheated M S out of \$100—*Held*, that the words were not in themselves actionable. *Winter v Sumwalt*, 38
3. In an action of slander, the plaintiff proved that the defendant, amongst a crowd of people assembled, said, pointing at the plaintiff, there is the man who stole my horse, and fetched him home yesterday morning—*Held*, that the words were actionable. *Bonner v Boyd*, 278  
See Variance 1.

#### SLAVE.

See Negroes & Slaves.

#### SODOMY.

1. An assault, with intent to commit the crime of *sodomy*, is within the act of 1793, *ch. 37*, and is thereby punishable. *Davis v The State*, 154
2. As the judgment may be either at common law, or under the act of assembly, the conclusion in the indictment, *contra formam statuti*, is not improper; and it is unnecessary to lay the *carnaliter cognovit* in the indictment. *Ib.*

#### SPECIAL AGREEMENT.

See Assumpsit 7.

#### SPECIAL AUTHORITY.

1. Where the levy court were directed, by the act of 1801, *ch. 77*, to meet on a particular day, and appoint a supervisor of the public roads, and take his bond, &c. and the levy court met on a different day, and made the appointment, and took the bond, &c.—*Held*, that there was a special authority delegated, which had not been strictly pursued by the levy court in making the appointment on the day directed by the law, and that the sureties in the supervisor's bond were not answerable for the due performance of the duties of the supervisor. *Kerr, et al. v The State use of the Levy Court*. 560  
See Conveyance 5.  
— Evidence 27, 34.  
— Notary Public.  
— Trust & Trustee 2.

#### SPECIAL DESCRIPTION.

See General Description 1.  
— Parol Evidence 2.

#### SPECIAL PERFORMANCE.

See Court of Chancery 4, 8.

#### STATE (THE)

See Intrusion 1.  
— Vacant Land 2.

#### STATUTE OF FRAUDS.

1. A sale of bank stock is within the statute of frauds of 29 *Car II, ch. 3*. *Colvin v Williams*. 38
2. — A broker who effects the sale, is to be considered the agent of both the owner and purchaser. *Ib.*  
See Parol Agreement 1, 2.

#### STIRPES.

See Descents 2.

#### SUBMISSION.

See Award.

#### SUBSTITUTION.

See Evidence 34.  
— Surety 1.

#### SUFFICIENCY OF EVIDENCE.

1. It belongs to the court to determine on the legal sufficiency of facts and circumstances which will warrant the jury in presuming and finding a grant. *Cockey's Lessee v Smith*, 20  
See Direction 1.

#### SUGGESTION.

See Ejectment 36.  
— Verdict 7.

#### SUGGESTION OF BREACHES.

See Breaches 1.

#### SUIT.

See Action.  
— Freedom 1.

#### SUPERSEDEAS.

See Habeas Corpus 1.

#### SURETY.

1. Where the sureties of W, deceased, late collector of public taxes, were compelled as such, to pay the amount due from the collector to the state, and for their reimbursement, an act of assembly authorised them to bring suits against persons owing taxes, in the same manner as W might; and as W could have brought suits, and recovered on proof of the taxes being due,

and that they were paid by him to the state, the sureties could do the same; and it is of no consequence whether the sureties altogether, or any one of them, paid to the state, or the collector had paid, for by substitution they stood in the place of the collector.

*Prather v Johnson et al.* 487

2. — If A, as surety of B, pays a debt to C, on proof of payment, A could recover of B; and an oral or written acknowledgment by C, of the payment, would be evidence in a suit against B by A. *Ib.* 490

See Assumpsit 4.

— Auctioneer 1, 2.

— Special Authority 1.

### SURPLUSAGE.

See Judgment 2.

### SURRENDER.

See Ejectment 26, 27, 29, 37.

— Estate for Life 2.

### SURVEY.

See Grant 3, 9.

— Parol Evidence 1, 4.

### SURVEYOR.

See Deposition 2, 3.

— Evidence 33.

— Parol Evidence 1.

### 'SURVIVORSHIP.

See Grant 4.

## T.

### TENANT.

1. A tenant in possession is estopped by his confession of lease, entry and ouster, and cannot controvert either the title or possession of the plaintiff in an action for *mesne profits* of land recovered in ejectment. See TRESPASS 1, and *Shipley v Alexander*, 84

### TENANT FOR LIFE.

See Ejectment 37.

— Estate for Life 2.

### TENANT IN TAIL.

See Estate Tail.

— Court of Chancery 14.

### TENANTS IN COMMON.

See Ejectment 35, 36, 37.

— Verdict 7.

### TENDER.

See Covenant 2.

## TERRETTENANT.

1. J W obtained a judgment against J D, and issued a *scire facias* thereon against R S, as his terretenant, who pleaded that J D was not seized, &c. — *Held*, that the *scire facias* could not be supported without the production of a grant for the land, or laying a sufficient foundation for presuming one. But that a grant for the land, with the deed offered in evidence from J D to R S, and the parol evidence that J D was, and had been, in possession of the land for nine years before his deed to R S, would be sufficient to support the issue for the plaintiff. *Saunders, terret. of Duley v Webster*, 432
2. J G obtained a judgment against B P, on which a *scire facias* was issued against his terretenant, who pleaded,  
1. That B P was not seized of the land of which he was returned tenant.  
2. That before the *scire facias* was issued a *ca. sa.* had been issued against B P, who was taken in execution, and committed to R A, the sheriff; that B P escaped, and suits were brought by J G on R A's bond as sheriff, for the escape, and judgments obtained against R A and his sureties—A demurrer to this last plea was ruled good. *Ford, terret. of Preston, v Gwinn's Adm'r.* 496
3. To show that B P was seized of the land, of which the defendant was on a *scire facias* returned tenant, at the time the judgment was rendered against him, evidence was given of a devise of the land to B P in 1766, by his father J P, who had been in possession a considerable time before his death—also a conveyance by B P to J L in May 1799; also a conveyance to J L to J H in June 1799; and also a conveyance from J H to the defendant in 1801—*Held*, that such evidence was not sufficient to prove a seizin in B P in the land in question at the time the judgment was obtained against him. *Ib.*

## TESTAMENTARY BOND.

See Administration Bond.

## TIME.

See Covenant 3.

## TOBACCO NOTES.

See Inspector of Tobacco 1.

## TRANSPPOSITION OF WORDS.

See Devise 4.

## TREASURER.

See Evidence 36.

## TRESPASS.

1. In trespass for *mesne profits* of land recovered in an action of ejectment, in the name of the plaintiff's lessee against the present defendant—*Held*, that the judgment in ejectment was legal and sufficient evidence to support this action, notwithstanding the judgment had been removed to, and was depending in the court of appeals, on a writ of error prosecuted by the defendant, and bond having been given as required by law; and altho' no writ of possession had ever issued, and the plaintiff had not made any entry into the premises since bringing the action of ejectment. That the tenant in possession was estopped by his confession of lease, entry and ouster, and could not controvert either the title or possession of the plaintiff; and it was sufficient for the plaintiff to produce the judgment alone, without showing the writ of execution executed, or possession acquired in any other manner. *Shipley v Alexander*, 84
2. — That the plaintiff can recover profits from the time of the demise, without showing title, the defendant being concluded by it. But if he claims profits prior to the time of the demise, the defendant may controvert his title. *Wood v Grundy & Thornburgh's Lessee*, 13
3. K executed to G a deed for a parcel of land, on which were a parcel of fence rails, which K, after the deed was executed, removed. G brought an action of trespass against K for taking and carrying away the fence rails, and K defended himself under his plea of a license to take them away, and proved at the trial, that in a conversation between him and G, before the deed was executed, G informed him that he would afterwards give him leave to move the rails whenever he should request him—*Held*, that such testimony might be offered to the jury. *Gibson v Kephart*, 430

See Bill of Sale 2.

— Fieri Facias 1.

— Sheriff 1.

## TRUST &amp; TRUSTEE.

1. He who accepts a trust takes it for the enolument of the persons for whom he is trusted, and not to take

any benefit to himself—See COURT OF CHANCERY 8, and *Turner v Bouchell's Ex'r. et al.* 99

2. Where a conveyance, executed by trustees under a decree of the court of chancery, was not sufficient evidence of a due execution of the trust, &c. See EVIDENCE 34, and *Dorsey v Courtney et al. Lessee*, 474

See Court of Chancery 18.

— Ejectment 31.

— Limitation of Actions 1.

— Pleading 7.

## U.

## USURY.

1. B, through an agent, applied to T to borrow a sum of money at an interest of 15 *per centum per annum*, to be secured by mortgage on a house and lot. T replied he was willing to advance the money, but would have nothing to do with a mortgage, but that he would purchase the property for the sum required, and would rent it to B for a rent equivalent to an interest of 15 *per centum per annum*, with privilege to B to redeem the property for the sum advanced, on paying up the rent. These terms were acceded to by B, who executed a deed to T, and received from him a lease reserving a rent equal to 15 *per centum per annum* on the sum advanced, payable quarterly, with a stipulation by T to reconvey the property at any time within five years, on payment by B of the sum advanced, with all arrearages of rent then due—*Held*, that on a question of usury it is the intention of the parties, which gives character to the transaction, and no matter what the form, where the real truth and substance is a loan of money, at more than an interest of six *per centum per annum*, no shift or device can take it out of the act of assembly against usury. *Tyson v Rickard*, 109
2. — That in the investigation of such questions, the original intention of the parties must often be come at by matter *de hors* the particular instrument of writing executed between them, *ib.*
3. — That it should be left to the jury to decide upon the whole of the evidence, whether, in the true contemplation of the parties, the transaction was a real sale by one, and a purchase by the other; or whether it was only colourable to hide a usurious loan. *ib.*

4. — That a stipulation to repay the principal in money, is not necessary to constitute a loan; it is enough if the principal is secured, and not *bona fide* put in hazard; and it matters not what the nature of the security is, if it is sufficient. If the principal is secured, and the interest reserved is more than the law allows, it is usury. *Ib.*
5. — That every case of usury must depend on its own circumstances; and the intention of the parties, when it can be come at, and not the words used, must govern. *Ib.*
6. — That the legal construction of the lease from T to B, (no matter what it is,) cannot regulate the case, if it was not the intention of the parties, that B might, by paying the principal at any time before the end of the first quarter, discharge himself from the rent due at the time of such payment; and that intention was matter for the jury. *Ib.*

See Court of Chancery 10, 11, 23.  
— Promissory Note 8.

## V.

### VACANT LAND.

1. The proprietary continued in the possession of all vacant lands until the acts of confiscation, which vested the right to those lands, and the actual seisin and possession, in the state, and the state's possession continued until the lands were granted. *Cockey's Lessee v Smith*, 20
- See Adversary Possession 1.  
— Intrusion.

### VACATION OF GRANTS, &c.

See Court of Chancery 18, 26.

### VARIANCE.

1. In an action of slander, one of the counts in the declaration, charged the defendant, with having made a voluntary affidavit, and caused certain false and malicious lies to be written therein, and among others, that "there was a certain quantity of *American* soap, which to his certain knowledge was sold at *Curacao* by the said A M, (the plaintiff,) at six dollars current money," and the affidavit, as offered in evidence by the plaintiff, stated the same words, except that the words "per box" were added after the words "six dollars." Held to be a fatal variance. *Wilson v Mitchell*, 91
- See Contract 3, 4.  
— Covenant 5.

See Debt 1.

- Declaration 4.
- Ejectment 5, 6.
- Location of Lands 3.
- Policy of Insurance.

### VARIATION.

1. The jury are to decide on the variation of the compass, and to make such an allowance as corresponds with the proof. *Hughes's Lessee v Howard*, 9
2. The jury, in fixing the variation of the compass, are not confined to any certain rules, but are governed by the circumstances existing in the case. *Ib.*
3. The jury in some cases have refused to make any allowance for variation, in others they have allowed at the rate of one degree for every twenty years, and in others they have been influenced by ancient runnings and proof of possession. *Ib.*

### VENIRE.

See Verdict 2, 3.

### VERBAL AGREEMENT.

See Warranty 1.

### VERBAL GIFT.

See Gift 1.

### VERDICT.

1. The jury are concluded by the admissions of the parties, as located upon the plots, in an action of ejectment, but if they disregard the admissions of the parties, and find the beginning of the land, for which the ejectment is brought, at a different place, the subsequent finding of the jury is predicated upon that mistake, and the court have no power to change the verdict. *Hughes's Lessee v Howard*, 9
2. If the verdict of a jury is insufficient or contrary to the admissions of the parties, the court have the power of granting a new trial, or ordering a *venire*. *Ib.*
3. Where a verdict is given, and the plaintiff moves for judgment thereon, which is refused by the court on the ground of the insufficiency of the verdict, and the plaintiff then moves for and obtains a *venire facias de novo*, and a new trial is had, and the second verdict is for the defendant, the plaintiff cannot on writ of error, take advantage of any error of the court below, in not entering judgment on the first verdict. He has relinquished all advantage he might have been entitled

to by acquiescing in the opinion of the court below. Per CHASE, Ch. J. *Ib.*

4. The omission to join in issue to some of the replications, is healed after verdict. *Tyson v Richard*, 109
5. The omission of an averment is sometimes aided after verdict, on the ground that every thing may be presumed to have been proved which was necessary to sustain the action; but where the bill of exceptions contain all the evidence offered to the jury, and upon which the court was required to direct them that the plaintiff was not entitled to recover, the verdict produces no such effect. *Walsh v Gilmer et al.* 409
6. Whether or not the word *verdict*, used in the act of 1811, ch. 161, is to be taken in a technical sense. *Harris v Jaffray use of Gwynn*, 550
7. In an action of ejectment on the joint demise of J H and J P to the plaintiff for part of a tract of land, and on separate demises by each of them for an undivided moiety of such part, the death of J P was suggested after the issue was joined, and a verdict was given for the plaintiff for one undivided twelfth part of the tract of land, described by lines on the plots. A motion in arrest of judgment was overruled, and judgment rendered on the verdict for the plaintiff. *Stevenson v Howard surv. of Pennington's Lessee*, 554

See Assumpsit 8.

— Declaration 3.

— Judgment 3, 4.

— Promissory Note 3.

#### VESTED ESTATE.

See Devise 1.

#### VESTED LEGACY.

See Legacy 1.

#### VOID & VOIDABLE.

See Devise 6.

#### VOLUNTARY AFFIDAVIT.

See Affidavit 1.

— Protest 1, 2.

— Variance 1.

#### W.

##### WARRANT OF RESURVEY.

1. The sheriff, under a warrant of resurvey issued in an action of ejectment, is authorised to take all depositions relating to the matter in dispute between the parties, and is not

confined to the taking of such testimony only as relates to the bounds of the lands to be surveyed. *Stewart, et al. Lessee v Mason*, 507

See Composition Money 2.

— Deposition 2, 3, 4.

— Evidence 42, 43.

#### WARRANTY.

1. In *assumpsit* on a verbal agreement to recover the price paid for merchandize, proved to be damaged, sold and delivered by the defendants to the plaintiff—*Held*, that the bare circumstance of selling goods and chattels for a full price, does not of itself raise a warranty; and the seller is not responsible for the unsoundness of such goods and chattels, unless he warranted them to be sound, or knew of their unsoundness at the time of the sale, in which latter case he would be liable for the fraud. *Johnston v Cope, et al.* 89
- See Insurance 2.

#### WASTE.

1. In an action of waste, the plaintiff offered in evidence a writ of *ad quod damnum*, under which the defendant claimed—an inquisition thereon, and a lease for 80 years, granted in pursuance thereof, for 20 acres of land particularly described, as being condemned for building a water mill thereon, dated in 1763. He also proved, that the land described on the plots in the cause within certain letters, was, at the time of the execution of the writ of *ad quod damnum*, unimproved and covered with timber, and other trees; and that the defendant applied the same to other purposes than for the use or support of the mill or houses; that he grubbed and cleared the land, and put it in cultivation by planting corn.—*Held*, that the plaintiff was not entitled to recover; that the defendant was not guilty of the waste complained of, but was justifiable under the writ of *ad quod damnum*, and the grant made in virtue thereof, in clearing and cultivating the land. *Adams v Brereton*. 124

#### WATER COURSE.

1. Where a natural water course runs through the lands of A and B, and A had, by cutting ditches on his own land, contiguous to the water course, increased the quantity of water which run down the course, to the injury of B's land, by overflowing the part adjoining the water course—*Held*, that

B had no right to erect a bank on his own land, across the water course, to stop or obstruct the course, in order to prevent such injury, and thereby overflow and damage the land of A. *Williams v Gale*, 231

See Covenant 4.

WILL.

1. The intention of a testator is to be collected from the words of his will, and the whole of the will is to be considered and compared, and such construction must be made as will gratify every part of the will, if it can be done consistent with the general intent. *Fourly's Lessee v Lammot*, 4

See Devise.

- Nuncupative Will.
- Transposition of Words.

WITNESS.

1. Where a claim was founded on a loss at sea in a trading voyage of late occurrence, the protest of the captain, he being dead, was produced as evidence of the loss. Part of the crew were stated to have been residents on the eastern shore of this state—to have returned in the vessel, and to have re-

mained some time after in *Baltimore*. Those persons were not searched for, and it did not appear that they had left the state, and could not be found — *Held*, that as those persons could not be presumed to be out of the reach of the process of the court, the plaintiff should have produced them, for they must be supposed to be equally cognizant of facts happening on board the vessel while on her voyage. *Patterson v The Maryland Insurance Company*, 74

2. A free black person is an incompetent witness in a case where the parties are free white christians. *Rusk v Sowerwine*, 97

See Evidence 23, 25, 29, 41, 42, 43.

- Free Negroes & Mulattoes 2.
- Partners & Partnership.
- Power of Attorney.
- Promissory Note 7, 8.

WORDS.

- See Slander.
- Transposition of Words.

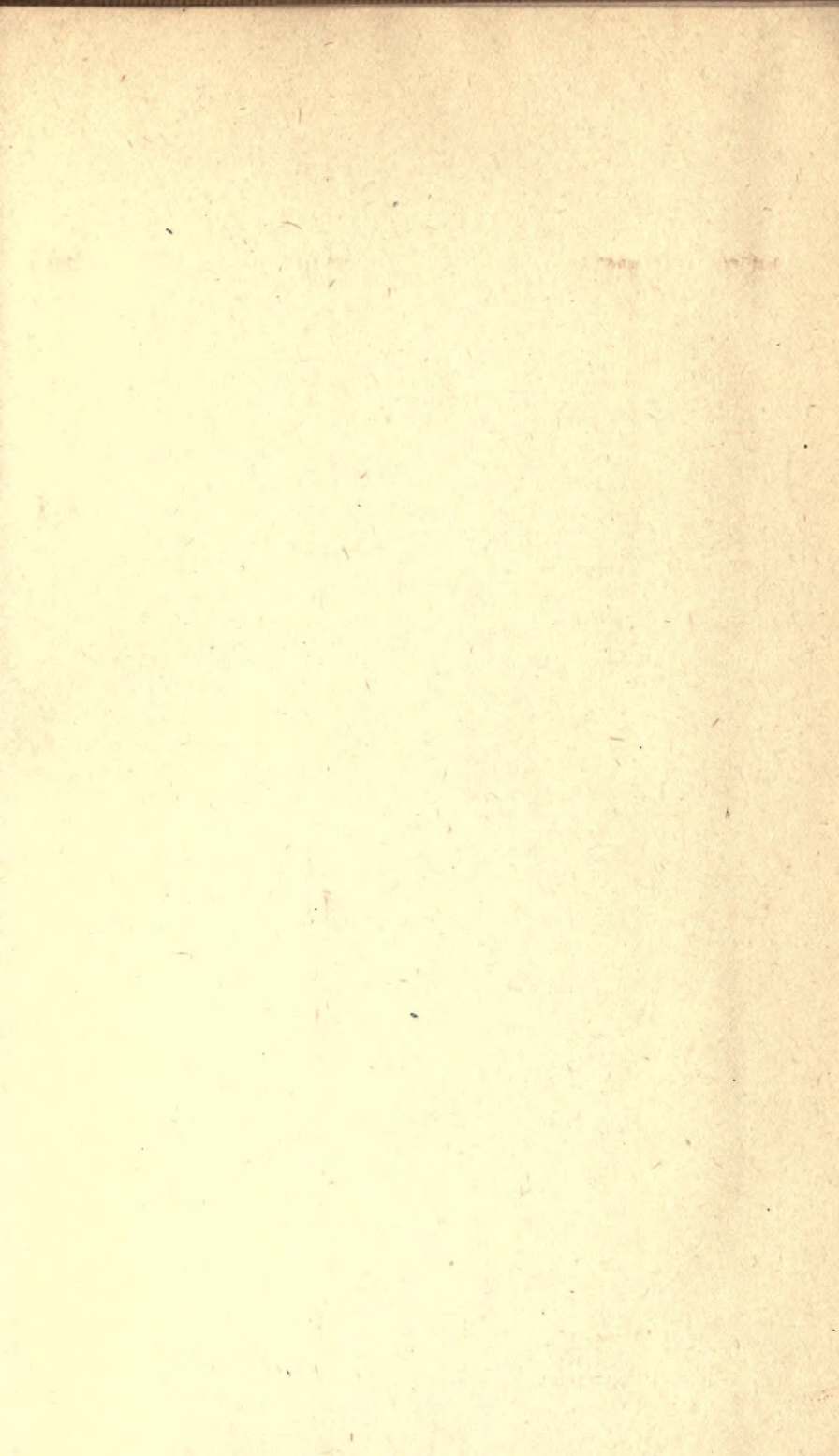
WRIT OF ERROR BOND.

See Appeal Bond.











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